TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 81

JULIAN RILEY AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITION FOR CERTIORARI FILED MAY 10, 1941.

CERTIORARI GRANTED MAY 26, 1941.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Record from Chancery Court of New Castle County	1	1
Bill of interpleader	1	1
Exhibit "A"—Petition filed in Surrogate's Court, New York County, New York, seeking temporary letters of admistration	11	8
Minute entry of service of bill	15	11
Decree of interpleader	26	12
Statement of claim of Julian Riley and Hughes Spalding	28	13
Exhibit "A"—Copy of record of Court of Ordinary of Fulton County, Georgia, showing grant of letters testamentary upon estate of Julia M. Hungerford to Julian Riley and Hughes Spalding	41	23
Exhibit "B"—Copy of proceedings on appeal by caveator to Fulton Superior Court	60	36

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 28, 1941.

Record from Chancery Court of New Castle County—Continued	Original	Print
Answer of New York Trust Company	133	51
Exhibit "A"—Copy of proceedings in the Surrogate's Court of the County of New York, New York, appointing the New York Trust Company as temporary administrator	148	63
Exhibit "B"—Certificate of Clerk of Surrogate's Court of the County of New York, evidencing issuance of letters of administration to the New York Trust Company	165	75
Exhibit "C"—Petition of State Tax Commissioner of State of New York filed in Surrogate's Court of the County of New York, that will be admitted to probate and that New York Trust Company be granted letters of administration; order of said court and citation	165	75
Exhibit "D"—Extracts from the Surrogate's Court Act of the State of New York	178	84
Petition of Riley, et al, for leave to amend complaint	188	89
Amendment to complaint	190	91
Exhibit "E"—Copy of proceedings in Fulton Superior Court of Georgia, consisting of exceptions pendente lite, motion for new trial and amendment thereto, order overruling motion and bill of exceptions	195	94
Exhibit "F"—Opinion of the Supreme Court of Georgia of November 14, 1936	234	105
Exhibit "G"—Remittitur and judgment on remittitur by Superior Court of Fulton County	239	110
Amendment to answer	319	112
Supplement to Exhibit "D" to answer Copy of Section 127 of the Surrogate's Court Act of the State of New York	321	113
Order granting leave to amend answer	322	114
Answer to amendment to complaint	323	114
Motion for decree notwithstanding answer	324	115
Order setting motion for hearing	325	116
Motion for leave to amend answer	326	116
Order granting leave to amend answer	326	117
Amendment to answer	327	117
Exhibit "E"—Excerpts from inheritance and estate tax laws of New York	330	118
Stipulation as to possession of stock certificates	332	120
Stipulation regarding letters to be part of record	332	120
Stipulation regarding exhibits to answer	335	122
Exhibit "A"—Order of Surrogate's Court for New York County	337	124
Exhibit "B"—Decree of Surrogate's Court for New York County	340	126

	Original	Print
Record from Chancery Court of New Castle County—Continued		
Stipulation regarding exhibits to answer	345	129
Exhibit "A"—Copy of order entered by Surrogate's Court for New York County	347	131
Exhibit "B"—Certificate of Surrogate's Court for New York County of issuance of letters of administration to the New York Trust Company	350	133
Opinion of Chancellor Wolcott on motion for decree notwithstanding answer	351	134
Order denying motion for decree notwithstanding answer	362	143
Stipulation relating to addition of New York Trust Company as party respondent and order thereon	362	143
Stipulation as to pleadings	364	145
Opinion of Chancellor Harrington	497	150
Testimony of witnesses	535	181
Colloquy between chancellor and counsel	535	181
Testimony of John Gaston	681	197
Final decree	843	200
Proceedings in Supreme Court of Delaware	1268	201
Request for issuance of writ of appeal	1268	202
Citation and sheriff's return	1269	202
Opinion of the court, Layton, C. J.	1271	203
Motion for reargument	1328	232
Order denying motion for reargument	1334	235
Stipulation as to stocks to be dealt with by decree	1335	235
Decree	1337	236
Motion as to taxation of costs	1347	241
Exhibit "A"—Affidavit of Daniel O. Hastings as to amounts expended for printing record and certifying the same together with receipts covering said items	1350	242
Order as to costs	1355	244
Clerk's certificate (omitted in printing)	1357	
Stipulation as to printing of record	1358	245
Order allowing certiorari	1361	246

[fol. 1]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

COCA-COLA INTERNATIONAL CORPORATION, a Corporation of the State of Delaware, Complainant,

vs.

THE NEW YORK TRUST COMPANY, a Corporation of the State of New York, as Temporary Administrator of the Estate of JULIA M. HUNGERFORD, Deceased, and JULIAN RILEY and HUGHES SPALDING, as Executors of the Estate of JULIA M. HUNGERFORD, Deceased, Respondents

BILL OF INTERPLEADER—Filed February 5, 1936

To the Chancellor of the State of Delaware:

Humbly complaining showeth unto your Honor the complainant, Coca-Cola International Corporation, a corporation of the State of Delaware, respectfully as follows:

(1) That Coca-Cola International Corporation, the complainant above named, is a corporation duly organized and [fol. 2] existing under the laws of the State of Delaware, having its principal office located at No. 100 West Tenth Street, in the City of Wilmington, New Castle County and State of Delaware. That complainant has an authorized capital stock consisting of 203,009 shares of Common Stock, without nominal or par value, and 113,619 shares of Class A stock, without nominal or par value, of which approximately 198,000 shares of Common Stock and 97,000 shares of Class A Stock are presently issued and outstanding in the hands of the public.

(2) That as complainant is advised, the respondent, The New York Trust Company, is a corporation of the State of New York, whose address is 100 Broadway, New York City, and the respondents, Julian Riley and Hughes Spalding, are non-residents of the State of Delaware, whose addresses are as follows: Julian Riley, 1197 Peachtree Street, Atlanta, Georgia, and Hughes Spalding, First National Bank Building, Atlanta, Georgia.

(3) That during all of the times hereinafter referred to, 626 shares of the Common Stock and 626 shares of the

Class A Stock of the complainant were and now are registered on the books of the complainant in the name of Julia M. Whitehead, and certificates representing said shares had theretofore been issued and were then and at all times since have been and are now outstanding in the name of the said Julia M. Whitehead. The numbers of said certificates as the same appear on the stock transfer books of the complainant are as follows:

Certificate No.	Shares	Class of Stock
A-294/9	600	Class A
TAO-322	26	Class A
A-501/6	600	Common
O-893	26	Common

[fol. 3] (4) That on or about December 21, 1935, the complainant received from Messrs. Baldwin, Hutchins & Todd, attorneys with offices in New York City, a notice which was in words and figures as follows:

"To: Coca-Cola International Corp., Wilmington, Delaware

You will please take notice that a petition for the appointment of a temporary administrator, a copy of which is attached hereto, has been filed in the Surrogates' Court in New York County, in which the validity of a paper purporting to be the Last Will and Testament of Julia Murphy Hungerford, is denied and the authority of any representative other than a representative appointed by the Courts of the State of New York, the decedent's residence, to collect and receive the interest and dividends on stocks and bonds owned by the said Julia Murphy Hungerford, standing either in that name or in the name of Julia Murphy Whitehead, is denied.

You will therefore be held responsible for any unauthorized transfer of any such stock.

Baldwin, Hutchins & Todd, Counsellors at Law, 120 Broadway, New York City, New York."

Attached to said notice was a copy of a petition by one O. Robert Hungerford, entitled "Surrogates' Court, New York County, In the Matter of the Application for Temporary Letters of Administration on the Goods, Chattels and Credits of Julia Murphy Hungerford, Deceased." Copy of said petition is hereto attached, marked Exhibit "A",

and complainant prays that the same may be taken as a part of this bill. From said notice and petition it appeared that the said Julia M. Whitehead, in whose name the said [fol. 4] 626 shares of Common Stock and 626 shares of Class A Stock of the complainant were registered, was, at the time of her alleged death on November 28, 1935, the wife of the said petitioner, O. Robert Hungerford, that subsequent to the decease of the said Julia M. Hungerford, a paper purporting to be the last will and testament of decedent had been probated in common form in the Court of Ordinary at Atlanta, Georgia, and had also been offered for probate in solemn form in said Court of Ordinary; and that the validity of the purported last will and testament and the authority of any representative other than a representative appointed by the Courts of the State of New York, the decedent's alleged place of residence, to collect and receive the interest and dividends on stocks and bonds owned by the said Julia M. Hungerford, was denied.

(5) That the complainant having thus been put upon notice of the death of the said Julia M. Hungerford and of the existence of apparently conflicting claims to the said shares of stock owned by the said decedent and standing on the books of the complainant in the name of Julia M. Whitehead, as aforesaid, has made no transfer of said shares of stock, or any part thereof, or issued any new certificates therefor, and has not paid the dividends accrued thereon, to the end that the proper representative of said decedent, legally entitled to require and receive the same respectively, might be determined.

(6) That the respondent, The New York Trust Company, and the respondents, Julian Riley and Hughes Spalding, jointly, have severally asserted claim to ownership, each in a separate representative capacity, of the said 626 shares of Common Stock and 626 shares of Class A Stock standing on the books of the complainant in the name of the said Julia M. Whitehead, as aforesaid, and each of said respective respondents has, by suit in equity separately brought and now pending in this Court, made demand upon the complainant that it transfer the said shares of [fol. 5] stock and issue and deliver new certificates therefor to and in the name or names of such respondent.

(7) That suit by the said respondents, Julian Riley and Hughes Spalding against Coca-Cola International Corpor-

ation, the complainant herein, as sole respondent, was instituted in this Court by bill of complaint filed herein on or about January 20, 1936, and complainant prays that said bill of complaint may, by this reference, be taken as a part of this bill, as fully as if set out herein at length. Service of subpoena in said suit was made upon complainant on January 21, 1936, and, under the rules of practice of this Court, complainant has until February 10, 1936, to file its answer therein.

(8) That as appears from the said bill of complaint the demand of the said Julian Riley and Hughes Spalding upon the complainant for transfer to them of the said shares of stock is based upon the allegation that the said Julian Riley and Hughes Spalding are vested with the legal title to said shares of stock in the capacity of domicilliary executors of the Estate of the said Julia M. Hungerford, by virtue of their alleged appointment and qualification as such executors under the will of the said Julia M. Hungerford, admitted to probate by the Court of Ordinary at Atlanta, Georgia, whereof it is alleged that the said Julia M. Hungerford was legally domiciled at the time of her death. That of the facts so alleged complainant has no knowledge and the reference to the said Julian Riley and Hughes Spalding as executors of the estate of Julia M. Hungerford, deceased, wherever the same appears in this bill, is not to be deemed or construed as constituting an admission by the complainant as to the truth or falsity of any of such allegations, but solely as a convenient designation of said respondents.

(9) That suit by the said respondent, The New York Trust Company, against Coca-Cola International Corporation, the complainant herein, and the said Julian Riley [fol. 6] and Hughes Spalding, individually and as purported executors of the estate of Julia M. Hungerford, deceased, as respondents, was instituted in this Court on or about January 31, 1936. Service of subpoena and of the bill of complaint in said suit was made upon the complainant on January 31, 1936 and, under the rules of practice of this Court, complainant has until February 20, 1936 to file its answer therein. Complainant prays that the said bill of complaint may, by this reference, be taken as a part of this bill as fully as if set forth herein at length.

(10) That as appears from the said bill of complaint, the demand of the said The New York Trust Company upon the complainant for transfer to it of the said shares of stock, is based upon the allegation that the said The New York Trust Company is vested with the legal title to said shares of stock in the capacity of temporary administrator of the estate of the said Julia M. Hungerford, by virtue of its appointment and qualification as such administrator under order of the Surrogates' Court of the County and State of New York, in which State it is alleged the said Julia M. Hungerford was legally domiciled at the time of her death. That of the facts so alleged, complainant has no knowledge and the reference to the said The New York Trust Company as temporary administrator of the estate of Julia M. Hungerford, deceased, wherever the same appears in the bill, is not to be deemed or construed as constituting an admission by the complainant as to the truth or falsity of any such allegations, but solely as a convenient designation of said respondent.

(11) That the complainant has no interest in and makes no claim to or upon said 626 shares of Common Stock and 626 shares of Class A Stock, or any part thereof, and is wholly indifferent as between the said claimants thereto, but is desirous to transfer said shares and to issue new certificates therefor to the true and lawful owner [fol. 7] or owners thereof, and the complainant hereby tenders and holds itself ready, able and willing so to do.

(12) That while the complainant is anxious and ready to transfer said shares of stock and to issue new certificates therefor to the person or persons legally entitled thereto, yet the complainant is ignorant of the rights of said claimants respectively, and so is unable safely to determine for itself to which of said claimants the said shares of stock of right belong, and cannot, without hazard to itself, recognize either of the aforesaid conflicting claims until the questions of law and fact involved therein shall be finally determined by some Court of competent jurisdiction.

(13) That pursuant to appropriate action by the Board of Directors of the complainant, there was made payable on December 31, 1935, to stockholders of record as of the close of business on December 12, 1935, semi-annual dividend of $3.00 a share upon the Class A Stock of complainant and

quarterly dividend of $6.00 a share upon the Common Stock of complainant.

(14) That by reason of the aforesaid declaration of dividend there became payable on December 31, 1935 in respect of said 626 shares of Common Stock the sum of $3756. and in respect of said 626 shares of Class A Stock the sum of $1878 and said dividends in the aggregate amount of $5634 were, on December 31, 1935, and at all times since have been available for payment to the proper and legal owner or owners of said Common and Class A shares. That said dividends have not heretofore been paid by complainant to any one for the reasons hereinbefore set forth. That the complainant has no interest in and makes no claim to or upon said dividends or any part thereof and avers that it is ready, able and desirous to make payment of said dividends in the full amount thereof to any person or persons who may be established and shown to be the true and lawful [fol. 8] owner or owners of said shares of stock and legally entitled to the dividends accrued thereon, and the complainant hereby tenders and holds itself ready, able and willing to pay the amount representing said dividends into the registry of this Court to abide the provision of any final decree which may be entered in this cause with respect to the payment and distribution thereof, if, as and when it may be directed by the Chancellor so to do.

Wherefore, the complainant being without adequate remedy save by the intervention of this Honorable Court in this cause, prays as follows:

(a) That a subpoena issue, directed to the said The New York Trust Company and the said Julian Riley and Hughes Spalding; each of the respondents above named, requiring them as respondents to appear and answer this bill of complaint in accordance with the rules of this Court.

(b) That the Chancellor make an order directing the said The New York Trust Company and the said Julian Riley and Hughes Spalding, as respondents, to appear in this Court by a day certain to be designated and make answer to this bill of complaint and providing for the service thereof upon said respondents by publication, pursuant to Section 3850 of the Revised Code of Delaware, as amended.

(c) That the said respondents may be decreed to interplead and adjust their said respective claims to the said

shares of stock between themselves; that the Chancellor may determine the respective rights of the respondents and make such orders and decrees in the premises as may be necessary or proper to protect the complainant; and that it may be ascertained, in such manner as the Chancellor shall direct, to which of said claimants new certificates evidencing the said shares of stock should be issued, and said dividends, accrued thereon should be paid.

(d) That in the meantime, preliminarily and pending final hearing, the said respondents, their and each of their [fol. 9] attorneys, solicitors, agents and servants, may be enjoined and restrained from instituting or prosecuting any action at law or suit in equity against the complainant with respect to said 626 shares of Common Stock and 626 shares of Class A Stock, or the certificates representing said shares, or the dividends accrued thereon, or otherwise proceeding against the complainant touching the subject matter of this bill, and that the complainant may be relieved from the duty of making answer in either of the aforesaid suits now pending against it in this Court.

(e) That a restraining order may forthwith issue to like effect.

(f) That the complainant may have such other and further relief as to the Chancellor may seem proper in the premises.

(g) That the complainant may be allowed its costs incurred herein.

Coca-Cola International Corporation, by W. C. D'Arcy, President.

Attest: Alexander L. Nichols, Secretary. (Corporate Seal.)

Hugh M. Morris, Ivan Culbertson, Solicitors for Complainant.

[fol. 10] *Duly sworn to by W. C. D'Arcy. Jurat omitted in printing.*

[fol. 11] "EXHIBIT A" TO BILL OF INTERPLEADER

SURROGATES' COURT,
New York County:

In the Matter of the Application for Temporary Letters of Administration on the Goods, Chattels and Credits of Julia Murphy Hungerford, Deceased

To the Surrogates' Court of the County of New York:

The petition of O. Robert Hungerford, residing at the Hotel Montclair, New York City, New York, respectfully shows:

1. That Julia Murphy Hungerford, the above named decedent, died in the City of Atlanta, Georgia, on the 28th day of November, 1935, and was a resident of the County and State of New York, at the time of her death.

2. That the said decedent died without leaving any valid last will and testament to the best of petitioner's knowledge, information and belief.

3. That your petitioner is of full age and is the husband of the decedent.

4. That a search of the records of this Court made by Francis A. Fullam, Jr., New York City, New York, on the 18th day of December, 1935, shows that no application has ever been made for letters of administration upon the estate of the said decedent or for the probate of a will of said decedent or for letters testamentary thereupon, and your petitioner is informed and verily believes that no such application has ever been made to the Surrogate's Court of any other county of this State.

[fol. 12] 5. That your petitioner is informed that a paper purporting to be the last will and testament of the decedent has been probated in common form in the Court of Ordinary at Atlanta, Georgia, upon the testimony of a single subscribing witness and without notice to your petitioner or any other party interested in the estate of the decedent. Your petitioner is further informed that said paper purporting to be the last will and testament of said decedent has been offered for probate in solemn form in said Court of Ordinary for proof by all the witnesses to said purported will after notice to all the heirs at law, but no hearing has yet been had thereon. Your petitioner, however, denies the validity of said purported will.

6. That, as your petitioner is informed and believes, the value of the personal property of which the decedent died possessed does not exceed the sum of $850,000, and consists largely of stocks and bonds, the location of which is unknown to your petitioner, except that your petitioner believes that the certificates representing a portion of said stocks are in the State of Georgia.

7. That, as your petitioner has been advised by Marion A. Smith and J. R. Bowden, attorneys of the State of Georgia, and verily believes, the courts of Georgia have no jurisdiction to admit to probate the will of a non-resident decedent, except as it affects real property in Georgia and an appointment of legal representatives of the estate of the decedent by the courts of Georgia is wholly ineffective as to personal property owned by decedent, who was a non-resident of said State, that there is no representative of decedent's estate legally authorized to collect and receive the interest and dividends on the stocks and bonds owned by said estate and there can be no legal representative authorized to receive said income until one is appointed by the courts of the State of decedent's residence, to wit: New York.

8. In order to prevent the payment of interest and dividends on bonds and stocks held by said estate to representa-
[fol. 13] tives appointed by the court in Georgia, who are without legal right or authority to collect or receive the same, it is necessary that temporary letters of administration be granted by this Court.

9. That decedent owned no real property in the State of New York at the time of her death.

10. That your petitioner, as the husband of the said decedent, is entitled to administration upon the estate of said decedent.

11. That said deceased left surviving the following distributees, whose names, degrees of relationship, post office addresses and ages are as follows:

Name	Relationship	Post Office Address	Age
Julia Murphy	Mother	1197 Peachtree St. Atlanta, Georgia	Over 21
Katharine Riley	Sister	1197 Peachtree St. Atlanta, Georgia	Over 21
O. Robert Hungerford	Husband	Hotel Montclair New York City	Over 21

12. That there are no other persons than those hereinabove mentioned interested in this proceeding.

13. That the above named decedent left her surviving no husband, no child or children, no child or issue of a deceased child, no adopted child or children, no issue of any deceased adopted child or children, no father, mother, brother or sister of the half or whole blood, no issue of a deceased brother or sister, no grandparents, other than those above named.

14. That the names of the Executors designated in said paper purporting to be the last will and testament of the [fol. 14] said decedent, as your petitioner is informed and believes, are as follows:

Julian G. Riley	1197 Peachtree Street Atlanta, Georgia
Hughes Spalding	First National Bank Building Atlanta, Georgia

15. That all of the persons hereinabove named in paragraphs 11 and 14 of this petition are of full age and sound mind.

16. That said deceased was in her lifetime a citizen of the United States.

Wherefore, your petitioner prays for an order or decree awarding temporary letters of administration to The New York Trust Company, and for the issuance of a citation directed to the said Julia Murphy and Katharine Riley, and for an order or decree directing that service of the above mentioned citation upon the said Julia Murphy and Katharine Riley be made by publication or, at the option of the petitioner, by delivering a copy of the citation to the persons so cited in person without the State, and for such further or other order in relation to such temporary letters of administration or the service of said citation as may be just and proper.

O. Robert Hungerford, Petitioner.

Dated, December 19th, 1935.

[fol. 15] *Duly sworn to by O. Robert Hungerford. Jurat omitted in printing.*

IN CHANCERY COURT OF NEW CASTLE COUNTY

MINUTE ENTRY OF SERVICE OF BILL

February 5, A. D. 1936—Subpoena issued and delivered to the Sheriff for service, which said subpoena was subsequently returned by the Sheriff marked as follows:

"Non sunt inventi as to The New York Trust Company, etc. and Julian Riley and Hughes Spalding, etc. March 13, 1936. So Ans. Harry C. Clark, Sheriff."

February 11, A. D. 1936—Affidavit of service of notice filed, which said affidavit is in words and figures as follows, to wit:

[fols. 16-25] STATE OF DELAWARE,
New Castle County, ss:

Alexander L. Nichols, being duly sworn according to law deposes and says:

That he is over the age of twenty-one years and is an associate in the law offices of Hugh M. Morris, solicitor for Coca-Cola International Corporation, the complainant in the above entitled cause, and that on Monday, February 10, 1936, he personally served upon Robert H. Richards, Esq., the solicitor of record for the complainant in that certain cause then pending in the Court of Chancery, of the State of Delaware in and for New Castle County, entitled "Julian Riley and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, deceased, complainants, v. Coca-Cola International Corporation, a corporation of the State of Delaware, defendant," and also upon Clarence A. Southerland, Esq., the solicitor of record for the complainant in that certain cause then pending in said Court entitled "The New York Trust Company, a corporation of the State of New York, as Temporary Administrator of the Estate of Julia M. Hungerford, deceased, complainant, v. Coca-Cola International Corporation, a corporation of the State of Delaware, and Julian Riley and Hughes Spalding, individually and as purported executors of the estate of Julia M. Hungerford, deceased, defendants," copy of the notice

hereto attached together with copy of the motion therein referred to.

Alexander Nichols.

Sworn to and subscribed before me this 11th day of February, A. D. 1936. R. C. Springer, Notary Public. (Notarial Seal.)

* * * * * * * *

[fol. 26] IN THE CHANCERY COURT OF NEW CASTLE COUNTY

DECREE OF INTERPLEADER—Entered May 15, 1936

On This 15th day of May, A. D. 1936, the Bill of Complaint in the above entitled cause having been taken pro confesso by order of the Chancellor dated May 5th, 1936, by which order the cause is directed to be heard ex parte on this date, and this cause having come on to be heard pursuant to said order of May 5th, 1936, and evidence in support of the Bill having been presented to and considered by the Chancellor, thereupon, upon consideration thereof,

It Is Ordered, Adjudged and Decreed by the Chancellor as follows:

(1) The Respondents are hereby directed to interplead between themselves as to their respective claims, rights or interests in and to the 626 shares of Common stock and the 626 shares of Class A stock of the Complainant and the [fol. 27] dividends accrued or to accrue thereon, which said shares of stock and dividends constitute the subject matter of the Complainant's bill of interpleader, and, to that end, the said Julian Riley and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, deceased, shall file their pleading in answer to said bill of interpleader within twenty days from the date hereof, such pleading to be in the nature of a bill of complaint setting forth the claim or right of said Respondents to the said shares of stock and dividends, and, within twenty days from the date of the filing thereof, the said The New York Trust Company, as Temporary Administrator of the Estate of Julia M. Hungerford, deceased, shall file its answer to said pleading of Julian Riley and Hughes Spalding, as Executors as aforesaid, or its cross bill, plea or demurrer, and thereafter this

cause shall proceed in accordance with the rules and practice of this Court, each of the Respondents to have the right to file such additional pleadings as the nature of the case may require.

(2) Until further order of the Chancellor, the said Respondents, Julian Riley and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, deceased, and The New York Trust Company, as Temporary Administrator of the Estate of Julia M. Hungerford, deceased, their and each of their agents, servants, employees and attorneys shall be and they hereby are enjoined and restrained from prosecuting the suits instituted by said Respondents, respectively, in this Court, and also from instituting any other action or proceeding at law or in equity against the Complainant herein with respect to said 626 shares of Common stock and 626 shares of Class A stock of the Complainant, more fully described in the Complainant's bill of interpleader, or the certificates therefor or the dividends accrued or which shall accrue thereon, and also from continuing the prosecution of any other pending action or suit, at law or in equity, as against the Complainant with respect to said stock, or obtaining a decree against the Complainant in any such other pending action or suit.

[fol. 28] (3) The Complainant is hereby given leave to hold and retain in its possession and control said 626 shares of Common stock and said 626 shares of Class A stock, which have heretofore been issued and are now registered upon the books of the Complainant in the name of Julia M. Whitehead, and the dividends which have accrued or which shall accrue thereon, until the further order of the Chancellor, and, until otherwise directed by order of the Chancellor to be entered in this cause, the Complainant shall not issue any certificates for or transfer said shares of Common and Class A stock or pay or dispose of the dividends accrued or which shall accrue thereon.

J. O. Wolcott, Examiner.

IN THE CHANCERY COURT, NEW CASTLE COUNTY

STATEMENT OF CLAIM OF JULIAN RILEY AND HUGHES SPALDING—Filed June 5, 1936

Now come Julian Riley and Hughes Spalding, Executors of Julia M. Hungerford, deceased, Respondents in the

above entitled cause, and, in compliance with the final decree in the above entitled cause dated May 15, 1936, directing these Respondents to file their pleading in the nature of a bill of complaint setting forth the claim and right of these Respondents to the 626 shares of Common stock and the 626 shares of Class A stock of the Complainant, Coca-Cola International Corporation, and the dividends accrued or to accrue thereon, constituting the subject matter of the Complainant's bill of interpleader, aver as follows:

(1) Julia M. Hungerford, these Respondents' testate, prior to and at the time of her death, was the lawful owner and holder of certificates for the 626 shares of Class A stock and the 626 shares of Common stock of Coca-Cola International Corporation described in Paragraph 3 of [fol. 29] Complainant's bill of interpleader, to wit,—Certificates for said Class A stock bearing Nos. A-294 to A-299, both inclusive, each for 100 shares, and Certificate No. TAO-322 for 26 shares, and certificates for said Common stock bearing Nos. A-501 to A-506, both inclusive, each for 100 shares, and Certificate No. o-893 for 26 shares. All of said certificates were and still are registered on the books of the Complainant in the name "Julia M. Whitehead", which was the name of said decedent prior to her marriage to one Robert Hungerford, also known as O. Robert Hungerford, said marriage having taken place subsequent to the issuance and delivery of said certificates of stock.

(2) Said Julia M. Hungerford, these Respondents' testate, died in the City of Atlanta, Fulton County, Georgia, on or about the 28th day of November, 1935, leaving a Will in which she named Julian Riley and Hughes Spalding, these Respondents, her Executors, and said Will, after the death of said decedent, was duly offered for probate in the Court of Ordinary of Fulton County, Georgia, and said Will was duly established and allowed in common form and also in solemn form by said Court of Ordinary of Fulton County, Georgia, and letters testamentary upon the Estate of the said Julia M. Hungerford were granted to the said Julian Riley and Hughes Spalding, as domiciliary Executors. Said Executors duly qualified as such and have been and are now acting as such Executors of the Estate of the said Julia M. Hungerford, deceased, and upon their qualification as Executors they came into possession of the stock certificates described in numbered paragraph (1) hereof

and they continued to have and still have possession of said certificates. Attached hereto marked Exhibit A is an exemplified copy of the record of said Court of Ordinary of Fulton County, Georgia, showing the grant of letters testamentary upon the Estate of the said Julia M. Hungerford, deceased, to these Respondents as Executors, and their [fol. 30] qualification as such, and these Respondents aver that they are still acting as such duly appointed and qualified domiciliary Executors.

(3) As appears from said Exhibit A, in the petition filed by these Respondents in the Court of Ordinary of Fulton County, Georgia, offering the Will of the said Julia M. Hungerford for probate in solemn form, the sole jurisdictional ground alleged in said petition was that the said Julia M. Hungerford was a resident of Fulton County, Georgia. Section 113-603 of the Code of Georgia provides as follows:

"*Jurisdiction of ordinary; residence Of Testator.*—The Court of ordinary shall have exclusive jurisdiction over the probate of wills, The residence of testator at his death shall give jurisdiction to the ordinary of that county."

(4) Upon the filing of said petition in the Court of Ordinary, a citation was duly issued, citing Julia G. Murphy, Katherine Riley and Robert Hungerford to appear at the January Term, 1936, of said Court or Ordinary in said probate proceedings, and said citation was duly served personally upon the said Robert Hungerford in Fulton County, Georgia, as will appear by reference to said Exhibit A.

(5) The said Robert Hungerford was the husband of the said Julia M. Hungerford, and the said Julia G. Murphy was the mother of the said Julia M. Hungerford, and the said Katherine Riley was the sister of the said Julia M. Hungerford. There were and are no other heirs at law of the said Julia M. Hungerford, and no other beneficiaries are named in the Will of the said Julia M. Hungerford, as appears from a copy of the said Will attached as a part of Exhibit A hereto.

(6) The persons named in numbered paragraph (5) hereof were the only parties entitled to be heard on the question of the probate of said Will.

[fol. 31] (7) Under the laws of Georgia, notice of a proceeding to probate a Will in solemn form must be served upon the heirs at law. The applicable statutory provision is Section 113-602 of the Code of Georgia, providing as follows:

"*Solemn form; notice; record; conclusiveness.*—Probate by the witnesses, or probate in solemn form, is the proving of the Will, after due notice to all the heirs at law, by all the witnesses in life and within the jurisdiction of the court, or by proof of their signatures and that of the testator, if the witnesses are dead or inaccessible; and the ordering to record of the will so proved. Such probate is conclusive upon all the parties notified, and all the legatees under the will who are represented in the executor."

(8) Under the intestate laws of Georgia, the husband is the sole heir at law of his wife where there are no children, and the said Julia M. Hungerford had no children. The applicable statutory provision is Section 113-902 of the Code of Georgia, providing as follows:

"113-902. (3930) *Husband sole heir of wife, when.*— Upon the death of the wife the husband is her sole heir, and upon payment of her individual debts, if any, make take possession thereof without administration, unless she died intestate leaving a separate estate without remainder or limitation over which can and does take effect, and leaves, with the husband, a surviving child or children, or descendants of a child or children; then such separate estate shall be equally dividend share and share alike, between said husband and said offspring per capita, but the descendants of children shall take per stirpes."

(9) After the filing of said petition for probate, and after he was legally and duly served as aforesaid, the said Robert Hungerford on the 3rd day of January, 1936, filed a caveat [fol. 32] to said probate proceeding in the Court of Ordinary of Fulton County, Georgia, objecting to the probate of said Will upon the alleged ground that the said Julia M. Hungerford did not have testamentary capacity, and undertaking to recite in said caveat "merely as a matter of record" that the said Julia M. Hungerford at the time of her death was not a resident of Fulton County, Georgia, as alleged in the petition for probate, but that she was, at said time, domiciled in the State of New York.

(10) Said probate proceedings came on for trial before the Court of Ordinary of Fulton County, Georgia, upon the issues made by the pleadings, and, after introduction of evidence, the Court of Ordinary on the 6th day of January, 1936, found and held that the said Julia M. Hungerford was a resident of and domiciled in Fulton County, Georgia, at the time of her death; that she was of sound mind and memory at the time of making said alleged Will; and rendered judgments overruling the grounds of said caveat and admitting said Will to record as having been duly proven in solemn form, all of which appears from said Exhibit A.

(11) Thereupon, letters testamentary were issued to these Respondents as the domiciliary Executors of the Will of the said Julia M. Hungerford, as appears from said Exhibit A.

(12) Under the laws of Georgia, an appeal lies from the Court of Ordinary to the Superior Court. The effect of such appeal, under the laws of Georgia, is to suspend but not to vacate the judgment of the Court of Ordinary; and, under such appeal, the issues are tried de novo. The applicable statutory provisions are Sections 6-501 and 6-502 of the Code of Georgia, providing as follows:

"*Appeals as de novo investigation.*—An appeal to the superior court is a de novo investigation. It brings up the whole record from the court below, and all competent evidence shall be admissable on the trial thereof, whether ad-[fol. 33] duced on a former trial or not; either party is entitled to be heard on the whole merits of the case."

"*Suspension of judgment.*—An appeal shall suspend but not vacate judgment; and if dismissed or withdrawn, the rights of all the parties shall be the same as if no appeal had been entered."

(13) The said Robert Hungerford appealed said probate proceedings to the Superior Court of Fulton County, Georgia, and said case came on regularly for trial in the Superior Court of Fulton County, Georgia, on the 21st day of April, 1936, on which day a jury was duly empannelled and sworn, and the cause proceeded to trial, which trial resulted in a verdict by the jury on the 22nd day of April, 1936, finding in favor of the propounders and against the

caveator, and that the Will propounded is the last Will and Testament of the said Julia M. Hungerford, and that the said Julia M. Hungerford at the time of her death resided in and was domiciled in Fulton County, Georgia, Judgment thereupon was rendered by the Court approving the verdict of the jury, and finding and adjudging that the said Julia M. Hungerford at the time of her death was a resident of and domiciled in Fulton County, and admitting said Will to probate in solemn form.

(14) Upon the rendition of said verdict and judgment thereon, a certified copy of the verdict and judgment was transmitted by the Clerk of Fulton Superior Court to the Clerk of the Court of Ordinary of Fulton County, Georgia, and the judgment of the Fulton Superior Court was made the judgment of Fulton Court of Ordinary, and the issuance of letters testamentary to Respondents as the domiciliary Executors of the Estate of Julia M. Hungerford was confirmed and ratified as of the date of issuance by the Fulton Court of Ordinary.

(15) An exemplified copy of the proceedings in the Fulton Superior Court wherein the aforesaid verdict and judg-[fol. 34] ment were rendered is hereto attached marked Exhibit B, and an exemplified copy of the Order and judgment of the Fulton Court of Ordinary following said proceedings in the Fulton Superior Court is hereto attached marked Exhibit C.

(16) While said proceedings were pending in the Fulton Court of Ordinary to probate the Will of the said Julia M. Hungerford in solemn form, in which proceedings the said Robert Hungerford had been served personally and had appeared, and after the Will had been probated in common form and letters testamentary had issued to these Respondents as the domiciliary Executors of the Will, and after these Respondents, as such Executors, had taken charge of and were in possession of the Estate of the said Julia M. Hungerford, including the stock certificates referred to above, the said Robert Hungerford, in and by the name O. Robert Hungerford, or O. R. Hungerford, filed an application in the Surrogates' Court of the County of New York, State of New York, seeking to have a temporary Administrator appointed by the said Surrogates' Court for the Estate of the said Julia M. Hungerford, alleging in said

petition that the said Julia M. Hungerford died without leaving any valid last Will and Testament and that the said Julia M. Hungerford was a resident of the County and State of New York at the time of her death in the City of Atlanta, Georgia, on November 28, 1935.

(17) Immediately after filing said petition in the Surrogates' Court of New York the said Robert Hungerford through his attorneys representing him in the filing of the petition in said Surrogates' Court, caused a notice to be sent to the Complainant herein of the filing of said petition for the appointment of a temporary Administrator and that he denied the validity of the paper purporting to be the last will and Testament of the said Julia M. Hungerford, and that he denied that any representative other than a repre- [fol. 35] sentative appointed by the courts of the State of New York was authorized to receive the interest and dividends on the stocks and bonds owned by the said Julia M. Hungerford, standing either in that name or in the name of "Julia Murphy Whitehead." Similar notices were sent to other corporations, including, among others, corporations under the laws of Georgia, in which said Julia M. Hungerford owned stock.

(18) These Respondents, upon learning of the notices sent to the Complainant and to other corporations in which the said Julia M. Hungerford held stock, filed in said Fulton Superior Court a bill in equity in aid of and supplemental and ancillary to the domiciliary Administration of the Estate of Julia M. Hungerford, setting up the proceedings instituted by the said O. Robert Hungerford and the facts, as hereinabove recited, as they had developed at that time and seeking the aid of said Superior Court in the administration of the Estate of the said Julia M. Hungerford upon the ground that the Estate of the said Julia M. Hungerford was in gremio legis, or in the constructive possession of Fulton Court of Ordinary, and that by virtue of the letters testamentary issued to these Respondents as the domiciliary Executors of said Julia M. Hungerford, the Fulton Court of Ordinary had drawn to itself jurisdiction over all assets of the Estate the situs of which was dependent upon the residence of the Testatrix at the time of her death, and that by reason thereof the Fulton Court of Ordinary, and the Fulton Superior Court exercising its ancillary jurisdiction in aid of the Fulton Court of Ordinary, had sole and exclu-

sive jurisdiction over the administration of said assets; that the proceedings instituted by the said O. Robert Hungerford constituted an unconscionable and inequitable attempt on the part of the said O. Robert Hungerford to interfere with the jurisdiction of the Fulton Court of Ordinary over the property and Estate of Julia M. Hungerford the situs of which was dependent upon the residence of Julia M. Hun- [fol. 36] gerford at the time of her death; and asking that the said O. Robert Hungerford be enjoined from further prosecuting said proceedings in the Surrogates' Court of New York.

(19) Upon the filing of said petition, a temporary restraining order was granted, and upon an interlocutory hearing an injunction was granted enjoining the said O. Robert Hungerford from proceeding in the Surrogates' Court of New York with the application for the appointment of a temporary Administrator upon the Estate of the said Julia M. Hungerford, pending a trial of the probate proceedings then pending in the Fulton Court of Ordinary in which the said O. Robert Hungerford had been personally served, and to which he had filed a caveat.

(20) Despite said injunction, the said application for temporary administration in the Surrogates' Court of New York, which was an ex parte application on the part of the said O. Robert Hungerford, resulted in the appointment of the New York Trust Company as temporary Administrator. In said proceeding, the Tax Commissioner of the State of New York, as Respondents are informed, appeared and sought the appointment of an Administrator in the State of New York to protect alleged claims of that State to inheritance or succession taxes, in the event the said Julia M. Hungerford should be held to have been a resident of that State.

(21) Upon the appointment of the said New York Trust Company as temporary Administrator, these Respondents filed an amendment to their ancillary proceedings instituted by them in the Fulton Superior Court, reciting the appointment of New York Trust Company as temporary Administrator of the Estate of Julia M. Hungerford in said ex parte proceedings upon the alleged ground that she died intestate and died a resident of New York and that the State of New York was entitled to collect the inheritance or suc- [fol. 37] cession taxes, and requiring the New York Admin-

istrator to set up whatever claim it might have as representative of the Tax Commission of the State of New York in the proceedings in the Fulton Superior Court. An exemplified copy of said bill as amended, and the orders thereon, are attached hereto marked Exhibit D.

(22) The Superior Court of Fulton County, Georgia, in said case, passed an order authorizing and directing these Respondents to take all necessary steps and proceedings and to file such suits as might be necessary or advisable in aid of said proceedings in the Fulton Superior Court to collect and receive the dividends on the stock of Coca-Cola International Corporation and other corporations, and to require the recognition of these Respondents, in their capacity of Executors of the Will of the said Julia M. Hungerford, as the owners and holders of said stock. These Respondents then filed in this Court a bill seeking to compel the transfer to them of said stock of the Complainant.

(23) These Respondents allege that by reason of the fact that they are the duly appointed, qualified and acting domiciliary Executors named in the Will of the said Julia M. Hungerford, and by reason of the fact that said Will was duly probated in solemn form after due and legal notice had been given to all heirs at law and other persons having any legal right to appear and be heard, and by reason of the fact that these Respondents, as such domiciliary Executors, have possession of the above mentioned certificates of stock of the Complainant, they are entitled to have said stock transferred to them and certificates therefor issued, and to be paid the dividends on said stock. These Respondents further aver that they are ready, able and willing to deliver said certificates to the Complainant, and they also are ready, able and willing to pay any taxes or other charges incident to such transfer, and these Respondents now offer and tender themselves as ready, able and willing to deliver said [fol. 38] stock certificates to the Complainant and to pay any taxes or other charges incident to the issuance of new certificates for said 626 shares of Class A stock and 626 shares of Common stock of the Complainant to and in the name of these Respondents, as Executors.

(24) These Respondents allege that the probate of the said Will under the circumstances hereinabove set forth conclusively established the factum of the Will against all persons, and likewise establishes the title of these Respond-

ents to said shares of stock, the subject matter of the bill of interpleader filed herein.

(25) These Respondents allege that by reason of said probate of said Will, the title of these Respondents to said shares of stock is derived from said Will and became vested in these Respondents, the domiciliary executors named therein, as of the instant of the death of the Testatrix.

(26) These Respondents allege that the purported appointment by the Surrogates' Court of the New York Trust Company as temporary Administrator of the Estate of the said Julia M. Hungerford was made in an ex parte proceeding, to which neither these Respondents nor any of the beneficiaries under said Will, other than the said O. Robert Hungerford, was a party, and that therefore the appointment of said temporary Administrator is not binding on these Respondents, as the Executors named in said Will, or upon the beneficiaries who were not parties to said proceedings in which said temporary Administrator was appointed; and these Respondents further allege that since the appointment of such temporary Administrator was procured by said Robert Hungerford under the circumstances hereinabove set forth and upon the alleged ground that the said Julia M. Hungerford died intestate when, as a matter of fact, she left a valid Will, said purported assignment of said temporary Administrator is void, and said temporary Administrator is not entitled to the possession of any part [fol. 39] of the Estate of said Julia M. Hungerford, and this is particularly true as to any portion of said Estate located elsewhere than in the State of New York. These Respondents, in this connection, allege that there were no assets belonging to said Estate in the State of New York.

Wherefore these Respondent pray as follows:

(A) That the Complainant, by and through its proper officers and agents, may be compelled by the decree of this Honorable Court to transfer on its books into the names of these Respondents, as Executors, the shares of stock forming the subject matter of the Complainant's bill of interpleader, and to issue and deliver to these Respondent's new certificates for 626 shares of the Class A stock and 626 shares of the Common stock of the Complainant;

(B) That the Complainant may be directed by decree of this Honorable Court to pay over and deliver to these

Respondents, as Executors, all dividends that were declared upon said shares of stock since the date of the death of said Julia M. Hungerford on November 28, 1935, and all dividends that may hereafter be declared thereon;

(C) That these Respondents may have such other and further relief as the nature of the case may require and as to this Honorable Court may seem proper.

Julian Riley, Hughes Spalding, Executors of Julia M. Hungerford, Deceased. Aaron Finger, Richards, Layton & Finger, Solicitors for Julian Riley and Hughes Spalding, Executors of Julia M. Hungerford, Deceased.

[fol. 40] *Duly sworn to by Julian Riley and Hughes Spalding. Jurat omitted in printing.*

[fol. 41] EXHIBIT A TO STATEMENT OF CLAIM

(Complainants Exhibit No. 1)

GEORGIA, Fulton County:

I, Julia M. Hungerford, being of sound and disposing mind and memory, do make, declare and publish this as my last Will and Testament, hereby revoking any and all other Wills which I may have previously made.

Item 1: I will and desire that my body receive proper burial, and that my funeral expenses and the expenses of my last illness be paid out of any monies belonging to my estate, and that all of my just debts be paid as promptly after my death as is consistent with the best interest of my estate.

Item 2: I give and bequeath to my husband, Robert Hungerford, the sum of Five Thousand Dollars ($5000.00), in cash, and the diamond link braclet; diamond wrist watch, and diamond ring containing two (2) diamonds and one (1) ruby, which articles of jewelry he gave to me.

Item 3: All the rest, residue and remainder of my estate of every kind and character, wherever situated, I give bequeath and devise, share and share alike, absolutely and in fee simple, to my Mother, Julia G. Murphy, and to my sister,

Katherine M. Riley. Should either my Mother or my Sister predecease me, I give bequeath and devise, absolutely and in fee simple, the share of my estate which such deceased Mother or Sister would have received to the survivor.

Item 4: I hereby nominate, constitute and appoint my brother-in-law, Julian Riley, and my friend Hughes Spalding, executors of this my last Will and Testament. I direct that no bond be required of them, and that no inventory or [fol. 42] appraisement of my estate be made, nor that they be required to make any reports to the Court of Ordinary or other Court. It is my Will that they wind up my estate and administer the same under the terms of this Will without any Court proceeding whatever. They are required however, as soon after my death as is practical, to make a full and complete list of all of my property, and to furnish a copy of the same to my Mother and to my Sister.

Item 5: My said Executors are empowered, for the purposes of paying my debts and/or for distribution, to sell and dispose of any portion or all of my estate at public or private sale, without order of any court, and upon such terms as in their judgment they think best. They may execute any and all deeds, conveyances, bonds for title, bills of sale, transfers, assignments, or any other writing or writings which in their judgment are proper or necessary to carry out the powers given them.

In Witness Whereof, I have hereunto set my hand and seal on this the 12th day of August 1933.

Julia M. Hungerford. (Seal.)

Signed, sealed, declared and publish- by the said Julia M. Hungerford, as the last Will and Testament, in the presence of us, the undersigned, who at the special instance and request of the Testatrix, and in her presence, and in the presence of each other, have subscribed the same as witnesses.

This the 12th day of August 1933.

John A. Sibley, Sumter M. Kelley, L. E. McKnight.

[fol. 43] State of Georgia,
County of Fulton:

To the Hon. Thomas H. Jeffries, Ordinary of said County:

The Petition Of Julian Riley and Hughes Spalding residents of said County and nominated Executors of the last

Will of Julia M. Hungerford, also a resident of said County, who died on the 28th day of November, 1935, owning valuable real and personal estate in said State disposed of by said Will, amounting to the sum of Twenty-five thousand ($25,000.00) dollars, and which remains to be administered, respectfully showeth that said Julia M. Hungerford died testate, that her Will is herewith presented for probate at the regular term of the Court of Ordinary of said County in common form; that your petitioners are named in said Will as its Executors; Wherefore your petitioners pray leave to prove said Will in common form, and the issuing to them of Letters Testamentary upon their taking the oath of office.

This 2nd day of December, 1935.

Julian Riley, Hughes Spalding, Residing at Atlanta, Ga.

STATE OF GEORGIA,
Fulton County:

Before Me Came Sumter M. Kelley named as a witness to the within writing, purporting to be Julia M. Hungerford's last Will, and being duly sworn, saith that he with L. E. McKnight and John A. Sibley, at the request of Julia M. Hungerford and in her presence and in the presence of each other, did attest as witnesses, the within writing as Julia M. Hungerford's Will; that the same was signed and published by her in their presence as her Last Will; that she was at the time of said attestation and signing by her of sound and disposing mind and memory; that she executed the within paper voluntarily.

Sumter M. Kelley.

[fol. 44] Sworn to and subscribed before me this 2nd day of December, 1935. Thos. H. Jeffries, Ordinary.

Fulton Court of Ordinary, December Term, 1935.

The Above Petition of Julian Riley and Hughes Spalding nominated Executors of the last alleged Will of Julia M. Hungerford duly filed, having been supported by proper proof of Sumter M. Kelly, a witness to said Will, that said Julia M. Hungerford died a resident of said County; that he and the other witnesses, L. E. McKnight and John A. Sibley saw her sign and heard her publish the alleged Will

as her own last Will; that he attested the same as a witness at her request; and in her presence with L. E. McKnight and John A. Sibley so attesting also at her request; that said Julia M. Hungerford was at the time of said signing and attestation, of sound and disposing mind and memory, and did, in the execution of said Will, act freely and voluntarily; it is ordered that the same be duly recorded, having been duly proved in common form; and that Letters Testamentary issue to them upon their taking the usual oath of office.

Dec. 2, 1935.

Thos. H. Jeffries, Ordinary.

Appearing on the back of the above statement was the foregoing:

[fol. 45] No. 4522

Fulton Court of Ordinary

Term, 1935

In Re Will of Julia M. Hungerford

Application to probate in Common Form filed in office December 2, 1935. Claude C. Mason, C. C. Ordinary. Min. 33, page 720.

[fol. 46] Executor's Oath

STATE OF GEORGIA,
Fulton County:

We do solemnly swear that this writing contains the true last Will of the within named Julia M. Hungerford, deceased, so far as we know, or believe, and that we will well and truly execute the same in accordance with the law of this State. So help us God.

Juilan Riley, Hughes Spalding.

Sworn to and subscribed before me, this 2nd day of December, 1935. Thos. H. Jeffries, Ordinary.

Letters Testamentary.

(State of Georgia—1776—Seal)

STATE OF GEORGIA,
Fulton County:

By Thoma- H. Jeffries, Ordinary of said County

Know All Whom it May Concern:

That on the 2nd day of December 1935, the last Will and Testament of Julia M. Hungerford, deceased, at the time of her death a resident of said County, was legally proven in common form, a copy of which is annexed, duly certified, and on the 2nd day of December 1935, at a regular Term of Court of Ordinary, said Will was admitted to record by order, and Julian Riley and Hughes Spalding, named Executors in said Will, allowed to qualify, and upon so doing Letters Testamentary ordered to be issued to them as such Executors.

Now, Therefore, The said Julian Riley and Hughes Spalding having taken the oath of office, and complied with all [fol. 47] the necessary prerequisites of the law, are legally authorized to discharge all the duties of Executors on the Will of said deceased, to administer the property of said deceased, which is devised according to the Will and the law;

Given under my hand and official seal, the 2nd day of Dec. 1935.

Thos. H. Jeffries, Ordinary. (Seal.)

(Appearing on the back of the above statement is the foregoing):

Letters Testamentary Issued to Julian Riley and Hughes Spalding, Executors of the Will of Julia M. Hungerford, Deceased. Recorded in Book N, page 392, Dec. 2nd, 1935. 19-. Thos. H. Jeffries, Ordinary.

[fol. 48] STATE OF GEORGIA,
Court of Ordinary,
County of Fulton, ss: (Seal.)

I, Claude C. Mason, Clerk of the Court of Ordinary of said County do hereby certify that I have compared the foregoing copy of the Last Will and Testament of Julia M. Hun-

gerford, deceased; Petition and Order to probate said Will in common form; Oath of Executors; together with letters issued to Julian Riley and Hughes Spalding, as Executors of said Will, with the original record and files thereof, now remaining in this office, and the same is a correct transcript therefrom, and of the whole of such original record and file, and that said Court is a Court of Record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court of Ordinary this the 16th day of January 1936.

Claude C. Mason, C. C. O.

STATE OF GEORGIA,
Court of Ordinary,
County of Fulton, ss: (Seal.)

I, Thomas H. Jeffries, Ordinary of said County, and presiding Magistrate of the Court of Ordinary thereof, do hereby certify that the above attestation, subscribed by Claude C. Mason, as Clerk of said Court, is sufficient and in due form of law, and that his signature thereto is genuine, and that full faith and credit are due to all of his official acts.

Witness my hand and official signature, this 16th day of January, 1936.

Thos. H. Jeffries, Ordinary.

(Appearing on the back of the above statement is the foregoing:)

[fol. 49] STATE OF GEORGIA,
Court of Ordinary,
County of Fulton, ss:

I, Claude C. Mason, Clerk of the Court of Ordinary of the County of Fulton, do hereby certify that Hon. Thomas H. Jeffries, whose name is subscribed to the preceding Certificate is the presiding Magistrate of the Ordinary's Court of the County of Fulton; duly elected, sworn and qualified, and that the signature of said Magistrate to said Certificate is genuine.

Witness my hand and official signature, this 16th day of January, 1936.

Claude C. Mason, Clerk of the Court of Ordinary.

GEORGIA,
Fulton County:

I, Julia M. Hungerford, being of sound and disposing mind and memory, do make, declare and publish this as my last Will and Testament, hereby revoking any and all other Wills which I may have previously made.

Item 1. I will and desire that my body receive proper burial, and that my funeral expenses and the expenses of my last illness be paid out of any monies belonging to my estate, and that all of my just debts be paid as promptly after my death as is consistent with the best interest of my estate.

Item 2. I give and bequeath to my husband, Robert Hungerford, the sum of Five Thousand Dollars ($5000.00), in cash, and the diamond link bracelet, diamond wrist watch, and diamond ring containing two (2) diamonds and one (1) ruby, which articles of jewelry he gave to me.

Item 3. All the rest, residue and remainder of my estate of every kind or character, wherever situated, I give, be-
[fol. 50] queath and devise, share and share alike, absolutely and in fee simple, to my Mother, Julia G. Murphy, and to my sister, Katherine M. Riley. Should either my Mother or my Sister predecease me, I give, bequeath and devise, absolutely and in fee simple, the share of my estate which such deceased Mother or Sister would have received to the survivor.

Item 4. I hereby nominate, constitute and appoint my brother-in-law, Julian Riley, and my friend, Hughes Spalding, executors of this my last Will and Testament. I direct that no bond be required of them, and that no inventory or appraisement of my estate be made, nor that they be required to make any reports to the Court of Ordinary or other Court. It is my Will that they wind up my estate and administer the same under the terms of this Will without any Court proceedings whatever. They are required, however, as soon after my death as is practical, to make a full and complete list of all of my property, and to furnish a copy of the same to my Mother and to my Sister.

Item 5. My said Executors are empowered, for the purposes of paying my debts and/or for distribution, to sell and dispose of any portion or all of my estate at public or private sale, without order of any court, and upon such terms as in

their judgment they think best. They may execute any and all deeds, conveyances, bonds for title, bills of sale, transfers, assignments, or any other writing or writings which in their judgment are proper or necessary to cary out the powers given them.

In Witness Whereof, I have hereunto set my hand and seal on this the 12th day of August 1933.

Julia M. Hungerford. (Seal.)

Signed, sealed, declared and published by the said Julia M. Hungerford, as her last Will and Testament, in the presence of us, the undersigned, who at the special instance and request of the Testatrix, and in her presence, and in the [fol. 51] presence of each other, have subscribed the same as witnesses.

This the 12th day of August, 1933.

John A. Sibley, Sumter M. Kelley, L. E. McKnight.

GEORGIA,

Fulton County:

To the Court of Ordinary of Said State and County:

The petition of Julian Riley anud Hughes Spalding, residents of said State, respectfully showeth:

That on the 28th day of November, 1935, Julia M. Hungerford, a resident of said County, departed this life, owning valuable real and personal estate in said State, having previously to that time signed a paper presented with this petition, which your petitioners claim to be said Mrs. Julia M. Hungerford's last will and testament and to be duly executed. That your petitioners are named therein as the Executors thereof. Your petitioners showeth that the following persons are heirs-at-law of said deceased, to wit:

Robert Hungerford, husband, who resides at Atlanta, Georgia:

Julia C. Murphy, mother, who resides at Atlanta, Georgia;

Katherine M. Riley, sister, who resides in Atlanta, Georgia.

Your petitioners pray leave to prove said Will in solemn form and that due and legal notice hereof be given to the said heirs-at-law.

Julian Riley.

[fol. 52] Julian G. Riley, Grant Building, Atlanta, Georgia; Hughes Spalding, First National Bank Building, Atlanta, Georgia; Fulton Court of Ordinary Chambers, December 2, 1935.

Julian Riley and Hughes Spalding, as Executors of Mrs. Julia M. Hungerford, having filed their petition for probate of Mrs. Julia M. Hungerford's will in solemn form, and it appearing that citation should issue herein, to be served personally on Robert Hungerford, Julia G. Murphy and Katherine M. Riley;

Ordered that the usual citation issue to be served on them ten days before the January Term, 1936, of this Court.

Thos. H. Jeffries, Ordinary.

GEORGIA,
Fulton County:

To—Mr. Robert Hungerford, Mrs. Julia G. Murphy, and Mrs. Katherine M. Riley:

Julian Riley and Hughes Spalding, having, as Executors, applied for probate in solemn form of the last will of Mrs. Julia M. Hungerford, of said County, and having made known to the Court that you are heirs-at-law of said Julia M. Hungerford; you are hereby cited to be and appear at the January Term 1936, of the Court of Ordinary for said County, as the will of Mrs. Julia M. Hungerford will then be offered for probate in solemn form.

Thos. H. Jeffries, Ordinary.

[fol. 53] We hereby acknowledge due and legal service of the within petition, order and citation, waive copies of the same and all other and further service or notice. This —— day of December, 1935.

Katherine M. Riley.

I have this day served Robert Hungerford at 418 Capital Ave. personally with a copy of the within and foregoing petition, order and citation.

This 3rd day of December, 1935.

A. C. Peacock, Deputy Sheriff, Fulton County, Georgia.

FULTON COURT OF ORDINARY, JANUARY TERM, 1936

It being shown to the Court, in the matter of Mrs. Julia M. Hungerford's last will and testament, propounded by

Julian Riley and Hughes Spalding, named as Executors therein, that said Mrs. Julia M. Hungerford died a resident of said County and that due notice of the intention of said propounders to proceed with the proof in solemn form at this Term of Court has been personally given to Robert Hungerford, and the said will having been fully proved in Open Court to be the last Will and testament of Mrs. Julia M. Hungerford, as alleged by the propounders in their petition, by the witnesses thereto:

Ordered by the Court that said will be established as Mrs. Julia M. Hungerford's last will and testament and that the same be admitted to record as proven in solemn form, and that said Executors have leave to qualify, and upon so doing that Letters Testamentary issue to them.

This 6th day of January, 1936.

Thos. H. Jeffries, Ordinary.

Note:—Appearing on the back of the above statement is the foregoing:

[fol. 54] No. 4519. Fulton Court of Ordinary, January Term, 1936. In re Will of Mrs. Julia M. Hungerford. Application to Probate in Solemn Form by Julian Riley and Hughes Spalding, Propounders. Filed in office Dec. 2, 1935. Claude C. Mason, C. C. Ordinary. Min. 34, page 376.

[fol. 55] EXECUTOR'S OATH

STATE OF GEORGIA,
Fulton County:

We do solemnly swear that this writing contains the true last Will of the within named Julia M. Hungerford, deceased, so far as we know, or believe, and that we will well and truly execute the same in accordance with the law of this State. So help us God.

Julian Riley, Hughes Spalding.

Sworn to and subscribed before me this 7th day of January, 1936. Thos. H. Jeffries, Ordinary.

Letters Testamentary. State of Georgia, Fulton County. By Thomas H. Jeffries, Ordinary of said County. (Seal.)

Know All Whom It May Concern:

That on the 6th day of January, 1936, the last Will and Testament of Julia M. Hungerford, deceased, at the time of her death a resident of said County, was legally proven in solemn form, a copy of which is annexed, duly certified, and on the 6th day of January, 1936, at a regular Term of the Court of Ordinary, said Will was admitted to record by order and Julian Riley and Hughes Spalding named Executors in said Will, allowed to qualify, and upon so doing, Letters Testamentary ordered to be issued to them as such Executors.

Now, Therefore, The said Julian Riley and Hughes Spalding having taken the oath of office, and complied with all the necessary prerequisites of the law, are legally authorized to discharge all the duties of Executors on the [fol. 56] Will of said deceased, to administer the property of said deceased, which is devised according to the Will and the law;

Given under my hand and official seal, the 7th day of January, 1936.

Thos. H. Jeffries, Ordinary.

Note: On the back of the above statement is the foregoing:

Letters Testamentary. Issued to Julian Riley and Hughes Spalding, Executors of the Will of Julia M. Hungerford, Deceased. Recorded in Book N, Page 422. January 7th, 1936, *19* .. Thos. H. Jeffries, Ordinary.

[fol. 57] Georgia,
Fulton County:

In the Court of Ordinary of said County: in re Petition of Hughes Spalding and Julian Riley: For Appointment in Solemn Form of the Alleged Will of Julia Murphy Hungerford:

And now at this term of the court comes Robert Hungerford, an heir at law of the said decedent, and enters this his caveat to the above stated petition and objects to the admission to record of the said will upon the following grounds, to-wit:

The said Julia Murphy Hungerford, at the time of making said pretended will, was not of sound and disposing mind and memory.

The petition to probate the said will incorrectly recites that the said decedent was a resident of Fulton County, Georgia, which is not correct, since the said decedent was domiciled in the State of New York at the time of her death and was temporarily visiting in Fulton County, Georgia. This recital is made, however, merely as a matter of record since the caveator acknowledges that there is real estate of the decedent located in Fulton County, Georgia, and hence the legal domicil of the decedent is not an issuable matter on a proceeding the sole purpose of which is to admit to record in solemn form an alleged will.

J. Richard Bowden, Harold Hirsch — Marion Smith,
Attorneys for Caveator.

FULTON COURT OF ORDINARY, JANUARY TERM, 1936

This cause having come on for hearing at this the January Term, 1936, of the Court of Ordinary of Fulton County, [fol. 58] Georgia, and the evidence having been introduced before me, and it appearing from the evidence and it is so found, that the testatrix Mrs. Julia M. Hungerford died a resident of and domiciled in Fulton County, Georgia, and that she was of sound mind, and memory at the time of the making of said alleged will it is found, adjudged and ordered that the caveat be and same is overruled upon both grounds thereof and said will is admitted to record as duly probated in solemn form and judgment is rendered accordingly on the petition to probate.

This Jan. 6, 1936.

Thos. H. Jeffries, Ordinary.

STATE OF GEORGIA,
Court of Ordinary,
County of Fulton, ss: (Seal.)

I, Claude C. Mason, Clerk of the Court of Ordinary of said County do hereby certify that I have compared the foregoing copy of the Last Will and Testament of Julia M. Hungerford, deceased; Petition to probate said Will in

solemn form, all Orders for citation and Order admitting said Will to probate in solemn form; Oath of Executors, Letters Testamentary issued to Julian Riley and Hughes Spalding, as Executors of said Will, also Caveat filed by Robert Hungerford to the probate in solemn form and the Order denying and overruling the said caveat, with the original record and files thereof, now remaining in this office, and the same is a correct transcript therefrom, and of the whole of such original record and file, and that said Court is a Court of Record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court of Ordinary this the 16th day of January 1936.

Claude C. Mason, C. C. O.

[fol. 59] STATE OF GEORGIA,
Court of Ordinary,
County of Fulton, ss: (Seal.)

I, Thomas H. Jeffries, Ordinary of said County, and presiding Magistrate of the Court of Ordinary thereof, do hereby certify that the above attestation, subscribed by Claude C. Mason, as Clerk of said Court, is sufficient and in due form of law, and that his signature there is genuine, and that full faith and credit are due to all of his official acts.

Witness my hand and official signature, this 16th day of January, 1936.

Thos. H. Jeffries, Ordinary.

NOTE: On the back of the above statements appears the foregoing:

STATE OF GEORGIA,
Court of Ordinary,
County of Fulton, ss:

STATE OF GEORGIA,
Court of Ordinary,
County of Fulton, ss:

I, Claude C. Mason, Clerk of the Court of Ordinary of the County of Fulton, do hereby certify that Hon. Thomas

H. Jeffries, whose name is subscribed to the preceding Certificate is the presiding Magistrate of the Ordinary's Court of the County of Fulton; duly elected sworn and qualified, and that the signature of said Magistrate to said Certificate is genuine.

Witness my hand and official signature this 16th day of January, 1936.

Claude C. Mason, Clerk of the Court of Ordinary.

[fol. 60] EXHIBIT "B" TO STATEMENT OF CLAIM

(Claimant's Exhibit No. 2)

GEORGIA,
Fulton County:

To the Court of Ordinary of said State and County:

The petition of Julian Riley and Hughes Spalding, residents of said State, respectfully showeth:

That on the 28th day of November, 1935, Julia M. Hungerford, a resident of said County, departed this life, owning valuable real and personal estate in said State, having previously to that time signed a paper presented with this petition, which your petitioners claim to be said Mrs. Julia M. Hungerford's last Will and Testament and to be duly executed. That your petitioners are named therein as the Executors thereof. Your petitioners showeth that the following persons are heirs-at-law of said deceased, to wit:

Robert Hungerford, husband, who resides at Atlanta, Georgia;

Julia G. Murphy, mother, who resides at Atlanta, Georgia;

Katherine M. Riley, sister, who resides in Atlanta, Georgia.

Your petitioners pray leave to prove said will in solemn form and that due and legal notice hereof be given to the said heirs-at-law.

Julian Riley, Julian G. Riley, Julian Riley, Grant Building, Atlanta, Georgia. Hughes Spalding, Hughes Spalding, First National Bank Building, Atlanta, Georgia.

[fol. 61] Book 640. Page 153

Fulton Court of Ordinary

Chambers, December 2, 1935.

Julian Riley and Hughes Spalding, as Executors of Mrs. Julia M. Hungerford, having filed their petition for probate of Mrs. Julia M. Hungerford's will in solemn form, and it appearing that citation should issue herein, to be served personally on Robert Hungerford, Julia G. Murphy and Katherine M. Riley;

Ordered that the usual citation issue to be served on them ten days before the January Term, 1936, of this Court.

Thomas H. Jeffries, Ordinary.

GEORGIA,
Fulton County:

To—Mr. Robert Hungerford, Mrs. Julia G. Murphy, and Mrs. Katherine M. Riley:

Julian Riley and Hughes Spalding, having, as Executors, applied for probate in solemn form of the last will of Mrs. Julia M. Hungerford, of said County, and having made known to the Court that you are heirs-at-law of said Julia M. Hungerford, you are hereby cited to be and appear at the January Term, 1936, of the Court of Ordinary for said County, as the will of Mrs. Julia M. Hungerford will then be offered for probate in solemn form.

Thos. H. Jeffries, Ordinary.

[fol. 62] Book 640, Page 154

We hereby acknowledge due and legal service of the written petition, order and citation, waive copies of the same and all other and further service or notice.

This — day of December, 1935.

Katherine M. Ril

I have this day served Robert Hungerford at 418 Capito Ave. personally with a copy of the within and foregoing petition, order and citation.

This 3rd day of December, 1935.

W. C. Peacock, Deputy Sheriff, Fulton County, Georgia.

No. 4519 (26602)

Fulton Court of Ordinary. January Term, 1936. Jan. 6

* * * * * * *

In Re Will of Mrs. Julia M. Hungerford

Application to Probate in Solemn Form by Julian Riley and Hughes Spalding, Propounders

* * * * * * *

Filed in Office, December 2, 1935. Claude C. Mason, C. C. Ordinary.

* * * * * * *

[fol. 63] Min. 34, Page 376

Spalding, Sibley, Troutman & Brock.

* * * * * * *

Suit 1514 First National Bank Bldg., Atlanta, Ga.

Charged 12/4 1935. L-1-29.

Book 640. Page 151

Georgia, Fulton County,

In the Court of Ordinary of said County:

* * * * * * *

In re Petition of Hughes Spalding and Julian Riley: For Appointment in Solemn Form of the Alleged Will of Julia Murphy Hungerford

* * * * * * *

And now at this term of the court comes Robert Hungerford, an heir at law of the said decedent, and enters this his caveat to the above stated petition and objects to the admission to record of the said will upon the following grounds, to-wit:

The said Julia Murphy Hungerford, at the time of making said pretended will, was not of sound and disposing mind and memory.

The petition to probate the said will incorrectly recites that the said decedent was a resident of Fulton County, Georgia, which is not correct, since the said decedent was domiciled in the state of New York at the time of her death and was temporarily visiting in Fulton County, Georgia. This recital is made, however, merely as a matter of record [fol. 64] since the caveator acknowledges that there is real estate of the decedent located in Fulton County, Georgia, and hence the legal domicil of the decedent is not an issuable matter on a proceeding the sole purpose of which is to admit to record in solemn form an alleged will.

J. Richard Bowden. Harold Hirsch & Marion Smith,
Attorneys for Caveator.

Filed in office Jany. 3, 1936. Claude C. Mason, C. C. O. Filed 1/10 19 36 Recorded 2/21 19 36 J. W. Simmons, C. S. C.

Fulton Court of Ordinary. January Term, 1936

This cause having come on for hearing at this the January term 1936 of the Court of Ordinary of Fulton County Georgia, and the evidence having been introduced before me, and it appearing from the evidence, and it is so found, that the testatrix Mrs. Julia M. Hungerford died a resident of and domiciled in Fulton County Georgia and that she was of sound mind and memory at the time of the making of said alleged will, it is found, adjudged and ordered that the caveat be and same is overruled upon both grounds thereof and said will is admitted to record as duly probated in solemn form and judgment is rendered accordingly on the petition to probate.

This Jan. 6, 1936.

Thos. H. Jeffries, Ordinary.

[fol. 65] Book 640. Page 155

Fulton Court of Ordinary

January Term, 1936.

It being shown to the Court, in the matter of Mrs. Julia M. Hungerford's last will and testament, propounded by Julian Riley and Hughes Spalding, named as Executors therein, that said Mrs. Julia M. Hungerford died a resident of said County, and that due notice of the intention of said

propounders to proceed with the proof in solemn form at this Term of Court has been personally given to Robert Hungerford, and the said will having been fully proven in Open Court to be the last will and testament of Mrs. Julia M. Hungerford, as alleged by the propounders in their petition, by the witnesses thereto:

Ordered by the Court that said will be established as Mrs. Julia M. Hungerford's last will and testament and that the same be admitted to record as proven in solemn form, and that said Executors have leave to qualify, and upon so doing that Letters Testamentary issue to them.

This 6th day of January, 1936.

Thos. H. Jeffries, Ordinary.

[fol. 66] Bond No. 98598

Book 640. Page 156

Georgia, Fulton County

In the Court of Ordinary of Said County. January Term, 1936

Number ——.

ROBERT HUNGERFORD, Appellant,

vs.

HUGHES SPALDING and JULIAN RHEY, Propounders of and Executors under the alleged Last Will and Testament of Julia M. Hungerford, Appellees

Appeal to the Superior Court of Fulton County, Georgia, From the Judgment of the Court of Ordinary of Said County, Probating the Alleged Will of Julia M. Hungerford in Solemn Form

* * * * * * *

Now comes Robert Hungerford, the caveator in the above named and stated case, and, being dissatisfied with the judgment of the Ordinary rendered therein on Jan. 6th, 1936, which was adverse to him and which allowed said alleged will of Julia M. Hungerford to be set up and probated in solemn form over his objections thereto, and having paid all the costs that have accrued in said case, and now on this

8th day of January, 1936 within four days after the rendition of said judgment, enters this appeal to this Superior Court of Fulton County, Georgia, and brings Great American Indemnity Company, as Security, and they, Robert Hungerford as Principal, and Great American Indemnity Company as Security, acknowledged themselves held and firmly bound unto the Appellees, Julian Riley and Hughes Spald- [fol. 67] ing, as executors under the alleged will of Julia M. Hungerford, deceased, for such further cost as may accrue by reason of such appeal in said case.

Signed and Sealed this 7th day of January, 1936.

O. Robert Hungerford (L. S.), Principal, by Harold Hirsch and Marion Smith and J. Richard Bowden, His Attorneys at Law in Said Case. Great American Indemnity Co., Security, by Eugene Oberdorfer, Attorney-in-Fact. (Seal.)

Approved by me this the 8 day of January, 1936. Thos. H. Jeffries, Ordinary.

Fulton Court of Ordinary:

I hereby certify that Robert Hungerford, Appellant, has paid all the costs that have accrued in said case appealed, and that the appeal bond was filed and appeal entered this the 8 day of January, 1936.

Thos. H. Jeffries, Ordinary of Fulton County, Georgia.

[fol. 68] In the Court of Ordinary of Fulton County, Georgia, January Term, 1936

Jan. 8.

Number 4731 (26602)

Robert Hungerford, Appellant,

vs.

Hughes Spalding and Julian Riley, Propounders of and Executors under the Alleged Last Will and Testament of Julia M. Hungerford, Appellees

Appellant's Bond for Appeal

Min. 34 Page 374. Filed in Office, Jany. 8, 1936. Claude C. Mason, CCC. Charged 1/8 1936.

Harold Hirsch & Marion Smith, attys., Hurt Bldg., Atlanta, Ga.

J. Richard Bowden, 1025 Citizens & Southern National Bank Building, Atlanta, Georgia.

[fol. 69] No. 110062. Fulton Superior Court & ——: Robert Hungerford versus Hughes Spalding as Exec., et al. Filed in Office, this the 10 day of Jan., 1936. C. M. Paschal, Deputy Clerk. Recorded Writs 640 Page 151 the day of 2/21, 1936. J. W. Simmons, Clerk. Fee $——.

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

No. 110,062

In re: Probate of Will of Julia M. Hungerford, Hughes Spalding and Julian Riley, Propounders,

vs.

O. ROBERT HUNGERFORD, Caveator

Book 649, page 233.

[fol. 70] Now Come Hughes Spalding and Julian Riley, propounders in the above stated cause, and demur to and move to strike the following portion of the caveat filed by the said caveator, upon the grounds hereinafter set forth:

1

The portion of the caveat referred to and which the propounders move to strike is that portion of the same embodied in the last paragraph of said caveat, reading as following:

"The petition to probate the said will incorrectly recites that the said decedent was a resident of Fulton County, Georgia, which is not correct, since the said decedent was domiciled in the State of New York at the time of her death and was temporarily visiting in Fulton County, Georgia. This recital is made, however, merely as a matter of record since the caveator acknowledges that there is real estate of the decedent located in Fulton County, Georgia, and hence the legal domicile of the decedent is not an issuable matter

on a proceeding the sole purpose of which is to admit to record in solemn form an alleged will."

The propounders move to strike said portion of said caveat upon the ground:

(a) That the same does not set forth any ground of objection to the probate of the will, or any legal reason why said will should not be admitted to probate;

(b) Because the same does not purport to offer or advance any issuable fact, or ground, or reason for refusing the probate of said will.

(c) Because said portion of said caveat purports merely to offer an alleged recital of fact merely as a matter of record and not as an issuable matter in said proceeding, and it is therefore improperly included in the caveat, it being [fol. 71] avowedly a mere effort on the part of the caveator to have something incorporated in the record without offering it as an issuable matter, or one to be passed upon either by a court or a jury; and the propounders therefore say that said matter should not be allowed to be incorporated in the record unless the caveator offers the same as an issuable matter.

2

The said propounders move to strike the following portions of said caveat, to-wit: that portion thereof in the last sentence of the said caveat reading as follows:

"This recital is made, however, merely as a matter of record since the caveator acknowledges that there is real estate of the decedent located in Fulton County, Georgia, and hence the legal domicil of the decedent is not an issuable matter on a proceeding the sole purpose of which is to admit to record in solemn form an alleged will."

because:

(a) The same is an effort on the part of the caveator to merely encumber the record without offering any allegation of fact, or contention of law, to be passed upon by a court or jury, and hence the said matter is improper and should be stricken;

(b) Because it is an effort on the part of the caveator to set up some different ground of jurisdiction than that al-

leged and relied upon by the propounders; but said caveator does not offer the will for probate and, therefore, he has no right to attempt to, in effect, amend the petition for probate filed by the propounders because if the caveator desires to offer the will for probate upon some jurisdictional ground other than that alleged by the propounders he should be required to so state in his pleadings;

[fol. 72] (c) The propounders, in their petition, have offered the will for probate as the testamentary disposition of all the property of the testatrix, both real and personal, and they have offered it upon the sole jurisdictional ground that the testatrix died a resident of Fulton County, Georgia, and that they are entitled to have the will probated upon that jurisdictional ground only in order that the executors therein named may qualify as the domiciliary representatives of the estate of the said testatrix. If the caveator desires to contest this jurisdictional ground, he should be required to do so clearly and unequivocally, but should not be allowed to encumber the record by alleging certain facts as to the domicile of the testatrix and, at the same time, allege that he is not putting in issue the question of her domicile.

3

The propounders had the right to invoke the jurisdiction of the Court of Ordinary and of this Court on appeal as to the jurisdictional ground upon which they offered said will for probate; namely, upon the ground that the testatrix was a resident of Fulton County, Georgia, at the time of her death; and, if the caveator desires to contest said jurisdictional ground, he should be required to do so in such manner as to distinctly and unequivocally raise such issue as an issue of fact. If he does not desire to do this, he should then not be allowed to state irrelevant matters merely for the purpose of having the same incorporated in the record.

4

Propounders have offered the will for probate upon the sole jurisdictional ground that the testatrix at the time of her death was a resident of Fulton County, Georgia, and have put in issue that the domicile of said testatrix was in Fulton County, at the time of her death, for determination by this Court of the fact of domicile and that the judgment of probate shall establish that the will is probated in the

[fol. 73] domicile of the decedent, for such a probate determines the question as to whether the will is governed by the laws of Georgia and the effect of the will with regard to the personal property wherever situated and the title of the propounders, as executors, thereto. The caveator has neither admitted nor denied the issue tendered by propounders that the testatrix was a resident of Fulton County, Georgia, at the time of her death and the allegation set forth as above recited should be stricken as irrelevant and immaterial.

Wherefore, Propounders pray that the foregoing grounds of this motion be sustained and the portions of the caveat referred to be stricken.

Colquitt, MacDougald, Troutman & Arkwright, J. A. Branch, Attorneys for Propounders.

The foregoing motion ordered filed; and it is ordered that a copy of the same and of this order be served upon counsel for O. Robert Hungerford, caveator, and that they show cause before me in the Motion Division of this Court at 9:30 o'clock a. m., on the 11th day of April, 1936, why the said motion should not be granted.

This the 7th day of April, 1936.

Hugh M. Dorsey, Judge, Superior Court, Atlanta, Circuit.

Minutes 166 Page 120.

Service of the foregoing motion and rule nisi acknowledged. Copy received.

This April 7, 1936.

[fol. 74] J. Richard Bowden, Harold Hirsch & Marion Smith, Attys. for O. Robert Hungerford.

Order on Minutes. No. 110062. 4-8, 4-22. In re Probate of Will of Julia M. Hungerford. 169/98. Spalding, et al., Propounders, vs. Hungerford. Minutes 166 Page 120. Demurrer and Motion to strike. Filed in Office, this the 7 day of Apr., 1936. C. M. Paschal, Deputy Clerk. Mo. No. 33705. Colquitt, MacDougald, Troutman & Arkwright, J. A. Branch, Attys., for Propounders.

[fol. 75] Book 646 Page 459.

FULTON SUPERIOR COURT

No. 110,062

HUGHES SPALDING and JULIAN RILEY, Propounders,

vs.

O. ROBERT HUNGERFORD, Caveator

Comes now O. Robert Hungerford, the caveator, and in response to the propounders' motion to strike a certain part of the caveat and the order of the court to show cause thereon, responds as follows:

1. Respondent admits that one ground of the motion to strike is well founded, to-wit, that part of subsection (b) of the paragraph numbered one, which asserts that the portion of the pleading of respondent which the court is asked to strike "does not offer or advance any issuable fact." Respondent admits that this ground is well taken, since respondent's denial that the decedent was domiciled in Atlanta cannot make an issue for trial in this case inasmuch as respondent is obliged in frankness in connection with said denial to concede that the decedent owned real estate in Fulton County, Georgia and hence the court would have jurisdiction to pass upon the factum of the will independently of her domicile; respondent not, however, admitting hereby that the decedent was domiciled in the State of Georgia, but admitting only that the court would in any event have said jurisdiction because of said real estate. Admitting therefore that said ground so specified is well taken respondent co-temporaneously herewith is amending his caveat by striking the portion which the propounders move to strike.

[fol. 76] Having taken this action it is unnecessary to respond to the other grounds of the motion to strike.

J. Richard Bowden & Harold Hirsch & Marion Smith,
Respondent's Attorneys.

Filed 4/13 1936. Recorded 4/17 1936. J. W. Simmons CSC.

No. 110,062. Fulton Superior Court. Hughes Spalding and Julian Riley, Propounders, v. O. Robert Hungerford,

Caveator. Response of Caveator to Motion to Strike. Recorded Writs 646 Page 459. 17 this Apr., 1936. J. W. Simmons, Clerk.

Filed in Office, this the 13 day of Apr., 1936. C. M. Paschal.

J. Richard Bowden, and Harold Hirsch and Marion Smith, Attorneys and Counsellors at Law, Suite 1045 Hurt Building, Atlanta, Ga.

[fol. 77] Book 647 Page 253.

FULTON SUPERIOR COURT

No. 110-062

HUGHES SPALDING and JULIAN RILEY, Propounders,

vs.

O. ROBERT HUNGERFORD, Caveator

Comes now the caveator and amends his caveat by striking therefrom the following language:

"The petition to probate the said will incorrectly recites that the said decedent was a resident of Fulton County, Georgia, which is not correct, since the said decedent was domiciled in the state of New York at the time of her death and was temporarily visiting in Fulton County, Georgia. This recital is made, however, merely as a matter of record since the caveator acknowledges that there is real estate of the decedent located in Fulton County, Georgia, and hence the legal domicile of the decedent is not an issuable matter on a proceeding the sole purpose of which is to admit to record in solemn form an alleged will."

J. Richard Bowden & Harold Hirsch & Marion Smith,
Caveator's Attorneys.

Filed 4/13 1936. Recorded 4/17 1936. J. W. Simmons, CSC.

Amendment allowed and ordered filed; this the 13th day of April, 1936.

Hugh M. Dorsey, Judge S. C. A. C.

169/52.

[fol. 78] Order of Minutes. No. 110,062. Fulton Superior Court. 4-15. Hughes Spalding and Julian Riley, Pro-

pounders, vs. O. Robert Hungerford, Caveator. Amendment to Caveat. 169/52. Filed in Office, this the 13 day of Apr., 1936. C. M. Paschal, Deputy Clerk.

Recorded Writs 647 Page 253. 17 this Apr., 1936. J. W. Simmons, Clerk.

J. Richard Bowden, and Harold Hirsch and Marion Smith, Attorneys and Counsellors at Law, Suite 1045 Hurt Building, Atlanta, Georgia.

We the jury find in favor of the propounders and against the caveat and that the will propounded is the last will and testament of Mrs. Julia M. Hungerford.

We further find that said Mrs. Julia M. Hungerford at the time of her death resided in and was domiciled in Fulton County Georgia.

This April 22, 1936.

J. W. Herron, Foreman.

169/98.

[fol. 79] In the Superior Court of Fulton County, Georgia

No. 110,062

In re: Will of Julia M. Hungerford

Appeal from Court of Ordinary, Fulton County, Georgia

Hughes Spalding and Julian Riley, Propounders,

vs.

O. Robert Hungerford, Caveator

The above stated cause, being in this Court on appeal from the Court of Ordinary of Fulton County, Georgia, said cause being a proceeding instituted in the Court of Ordinary of Fulton County, Georgia, by Hughes Spalding and Julian Riley, as propounders, seeking the probate in solemn form of the Will of Julia M. Hungerford, to which said proceeding O. Robert Hungerford, as caveator, filed a caveat, and the cause having come on for trial before this Court at this the March Term 1936, and having been regularly tried before the Court and the jury, having on the 22nd day of April 1936, returned a verdict as follows:

"We the jury find in favor of the propounders and against the caveat and that the Will propounded is the last

Will and Testament of Mrs. Julia M. Hungerford. We further find that the said Mrs. Julia M. Hungerford, at the time of her death, resided in and was domiciled in Fulton County, Georgia.

It is Considered, Ordered and Adju-ged that the verdict returned by the jury in said cause be, and the same is hereby approved and made the judgment of this Court, and it is further held and adjudged that the said Julia M. Hunger-ford at the time of her death was a resident of, and domiciled in, Fulton County, Georgia.

[fol. 80] It is Further Ordered and Adjudged that the said Will offered for probate, as aforesaid, is the Last Will and Testament of the said Julia M. Hungerford, and it is there-fore adjudged and ordered that said Will be admitted to record as having been proven in solemn form.

Further Ordered that the Clerk of this Court transmit to the Court of Ordinary of said County a certified copy of the verdict in this cause, and of this Judgment.

In Open Court, this the 24th day of April 1936.

Edgar E. Pomeroy, Judge Superior Court Atlanta Circuit.

169/183.

Colquitt, MacDougald, Troutman & Arkwright, James A. Branch, Attys. for Propounders.

No. 110,062. Fulton Superior Court. In re: Will of Julia M. Hungerford. Hughes Spalding and Julian Riley, Pro-pounders, vs. O. Robert Hungerford, Caveator. Order. Filed in Office, this the 24 day of Apr. 1936. D. W. Brown, Deputy Clerk.

[fol. 81] Georgia,
Fulton County, ss:

I, J. W. Simmons, Clerk of the Superior Court of Fulton County, do hereby certify that I have compared the fore-going copy of Petition of Julian Riley and Hughes Spald-ing; Order for citation; Citation; Acknowledgement of service by Katherine M. Riley; Return of service on Robert Hungerford; Caveat of Robert Hungerford; Order over-ruling caveat; Judgment of Court of Ordinary; Appeal to Superior Court of Fulton County; Demurrer and motion to strike; Response of Robert Hungerford to motion to

strike; Amendment to caveat; Verdict of Jury; Judgment of Superior Court; all in the case of Julian Riley and Hughes Spalding, propounders against Robert Hungerford, caveator, case No. 110,062, in the Superior Court of Fulton County, Georgia, with the original record thereof, now remaining in this office, and the same is a correct transcript therefrom and of the whole of such original record, and that said Court is a Court of Record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this the 27th day of May, 1936.

J. W. Simmons, Clerk Superior Court of Fulton County, Georgia. (Seal.)

GEORGIA,
Fulton County, ss:

I, Virlyn B. Moore do certify that I am Judge of the Superior Court of Fulton County, Georgia, and that I am the presiding Judge of said Court, and that the above attestation, subscribed, by J. W. Simmons as Clerk of said Court, [fols. 82-132] is sufficient and in due form of law, and that his signature thereto is genuine.

Witness my hand and official signature, this the 27th day of May 1936.

Virlyn B. Moore, Judge Superior Court, Fulton County, Georgia. (Seal.)

GEORGIA,
Fulton County, ss:

I, J. W. Simmons, Clerk of the Superior Court in and for said County, hereby certify that the above attestation of Hon. Virlyn B. Moore, Judge of the Superior Court of Fulton County Georgia, is his genuine signature, and that he is Judge of said Court, and said certificate is in due form of law.

Given under my hand and seal of office this the 27th day of May, 1936.

J. W. Simmons, Clerk Superior Court of Fulton County, Georgia.

* * * * * * *

[fol. 133] IN THE CHANCERY COURT, NEW CASTLE COUNTY

ANSWER OF NEW YORK TRUST CO.—Filed July 24, 1936

To the Chancellor of the State of Delaware:

Now comes The New York Trust Company, a corporation of the State of New York, as temporary administrator of the Estate of Julia M. Hungerford, deceased, respondent in the above entitled cause, and in compliance with the final decree in the above cause, dated May 15, 1936, directing it to file its pleading in the nature of an answer to the pleading of the other respondent (which pleading will be hereinafter referred to as the bill of complaint), as well as for the purpose of setting forth the claim and right of this respondent to 626 shares of Common stock and 626 shares of Class "A" stock of the complainant, Coca-Cola International Corporation, and the dividends accrued or to accrue thereon, avers as follows:

1. This respondent admits the allegations of paragraph 1 of the bill of complaint.

2. For answer to paragraph 2 of said bill of complaint, this respondent admits that Julia M. Hungerford died in the City of Atlanta, Fulton County, Georgia, on or about November 28, 1935. This respondent admits that a paper purporting to be the last will and testament of the said Julian M. Hungerford, wherein the respondents Julian Riley and Hughes Spalding were named as executors, was offered for probate in the Court of Ordinary of Fulton County, Georgia, and that certain proceedings were had thereon, as set forth in the exhibits to said bill of complaint and as hereinafter set forth in this answer. This respondent denies that said Julian Riley and Hughes Spalding are domiciliary executors of the estate of the said Julia M. Hungerford, deceased, and avers that in truth and in fact, as hereinafter more fully [fol. 134] set forth, the said Julia M. Hungerford was not a resident of or domiciled in the State of Georgia at the time of her death. In so far as said proceedings in the Court of Ordinary of Fulton County, Georgia, purport to show that said Julian Riley and Hughes Spalding are domiciliary executors under said last will and testament, this respondent avers that for the reasons hereinafter set forth, said proceedings are without any legal effect. This respondent further avers that an appeal from said proceeding is now pend-

ing and undetermined in the Supreme Court of the State of Georgia, in so far as concerns the finding of the domicile of the testatrix.

3. For answer to paragraph 3 of said bill of complaint, this respondent admits that Exhibit A to said bill of complaint is a true and correct copy of certain proceedings in the Court of Ordinary of Fulton County, Georgia, and admits that the provisions of Section 113-606 (erroneously referred to in said paragraph 3 as Section 113-603) are as set forth in said paragraph 3. Respondent admits that the said Court of Ordinary of Fulton County, Georgia had jurisdiction to probate the will of said Julia M. Hungerford, deceased, but avers that in fact and in law such jurisdiction arose solely because of the fact that the testatrix owned certain real property in Fulton County, Georgia, and that such ownership conferred jurisdiction upon said Court of Ordinary to probate said will, regardless of the domicile of said testatrix in accordance with the provisions of Section 113-702 of the Code of Georgia, which this respondent avers was in full force and effect at the time of the death of the testatrix, and is still in full force and effect. Said Code section 113-702 provides as follows:

"113-702. (3871, 3873, 3874) Wills devising realty; requisites for probate.—If real estate in this State is devised or bequeathed by the terms of a foreign will, such will, if in writing, attested and executed according to the laws of this State, may be admitted to probate in common or solemn [fol. 135] form in the court of ordinary in any county of this State in which property is situated, in the same manner and upon like proof as in cases of domestic wills, and shall be subject to the same defenses and objections."

This respondent avers that said petition for probate incorrectly averred the residence of the testatrix, and denies that said averment constituted any jurisdictional ground for the probate of said will, and denies that said averment gave to said Court of Ordinary of Fulton County, Georgia, any jurisdiction whatever over the estate of said decedent, except in respect of the real estate above referred to.

4. For answer to paragraph 4 of said bill of complaint, this respondent admits that said Exhibit A is a true and correct copy of certain proceedings in said Court of Ordinary of Fulton County, Georgia.

5. This respondent admits the allegations of paragraph 5 of said bill of complaint.

6. For answer to paragraph 6 of said bill of complaint, this respondent admits that under the law of the State of Georgia the persons named in paragraph 5 of said bill of complaint were the only parties entitled to be heard on the question of the probate of said will; but avers that they were not the only parties interested in the estate of the decedent, and further avers that all creditors of the decedent were interested in said estate, including the State of New York, which has certain claims for inheritance and estate taxes against said estate.

7. For answer to paragraph 7 of said bill of complaint, this respondent admits that the provisions of Section 113-602 of the Code of Georgia are as set forth in said paragraph 7.

8. For answer to paragraph 8 of said bill of complaint, this respondent admits that the provisions of Section 113-[fol. 136] 902 of the Code of Georgia are as set forth in said paragraph 8.

9. For answer to paragraph 9 of said bill of complaint, this respondent refers to the copies of the record of certain proceedings of the Court of Ordinary of Fulton County, Georgia, set forth in Exhibit A to said bill of complaint, and admits that said Exhibit A is a true and correct copy of the record of said proceedings.

10. For answer to paragraph 10 of said bill of complaint, this respondent refers to the copies of the record of certain proceedings of the Court of Ordinary of Fulton County, Georgia, set forth in Exhibit A to said bill of complaint, and admits that said Exhibit A is a true and correct copy of the record of said proceedings. This respondent avers, however, that in so far as the judgment or decision of said Court of Ordinary purported to hold or decide that the said Julia M. Hungerford was domiciled in Fulton County, Georgia, at the time of her death, said judgment is in no wise binding upon this respondent, for the reason that this respondent was not a party to said proceedings. This respondent further avers that under the law of the State of Georgia, in full force and effect during all the time of said proceedings of said Court of Ordinary of Fulton County, Georgia (as appearing in the decisions of the Supreme Court of the State

of Georgia in the following cases: University of Georgia v. Denmark, 141st Georgia Reports, p. 390; Johnson v. Ellis, 172nd Georgia Reports, p. 344; Wetter v. Habersham, 60th Georgia Reports, p. 193; and Underwood v. Thurman, 111th Georgia Reports, p. 325), said Court of Ordinary, on the probate of a will, has no jurisdiction or power to render any judgment or decree except with respect to the factum of the will, and further avers that in so far as said Court of Ordinary attempted to make a further finding and attempted to make any finding of the fact of domicile, the said finding was beyond the power and jurisdiction of said court under the law of the State of Georgia, and is void and of no effect and [fol. 137] in no wise binding on the courts of the State of Delaware. Said respondent further avers that in the proceedings relating to the probate of said will of said decedent, the domicile of the decedent was not and could not have been a jurisdictional issue, for the reason that said Court of Ordinary in any event had jurisdiction to pass upon the factum of the will for the reasons hereinbefore stated.

11. For answer to paragraph 11 of said bill of complaint, this respondent refers to the copies of the record of certain proceedings of the Court of Ordinary of Fulton County, Georgia, set forth in Exhibit A to said bill of complaint, and admits that Exhibit A is a true and correct copy of the record of said proceedings. This respondent avers, however, that the description or designation of said Julian Riley and Hughes Spalding as domiciliary executors of said decedent is incorrect and void, for the reason that said decedent was not a resident of the State of Georgia at the time of her death, hereinafter more fully set forth, and further avers that the attempted finding of the fact of the residence of said decedent was void and of no effect, and beyond the power of the Courts of the State of Georgia, and is not binding upon this respondent or upon the Courts of the State of New York or upon the Courts of the State of Delaware.

12. For answer to paragraph 12 of said bill of complaint, this respondent admits that the provisions of Sections 6-501 and 6-502 of the Code of Georgia are correctly set forth in said paragraph 12. This respondent avers, however, that it is the law of the State of Georgia (settled by the decision of the Supreme Court of the State of Georgia in the case of Field v. Brantley, 139 Georgia Reports, p. 439, construing

the applicable statutes of that State) that upon the de novo proceedings in the Superior Court on appeal, said Superior Court has only the special and limited jurisdiction granted to the Court of Ordinary and transferred by such appeal to the Superior Court.

[fol. 138] 13. For answer to paragraph 13 of said bill of complaint, this respondent admits that the copies of the record of certain proceedings in the Superior Court of Fulton County, Georgia, set forth in Exhibit B to said bill of complaint, are true and correct copies of such proceedings, but avers that the record of said proceedings set forth in said Exhibit B is not the true and complete record of said proceedings in said Superior Court, and does not set forth certain matters and things respecting the trial of the cause in said court, which, since said trial, have been duly made a part of the record of said Superior Court as a part of the motion for a new trial filed therein. This respondent admits that the copies of the record of certain further proceedings in the Court of Ordinary, set forth in Exhibit C to said bill of complaint, are true and correct copies of the record of said proceedings.

For further answer to said paragraph 13 of said bill of complaint, this respondent avers that at the trial of the said cause in the said Superior Court it was proved, without dispute, that said Julia M. Hungerford at the time of her death owned certain real property situated in Fulton County, Georgia. Respondent further avers that the question of domicile was not and could not be an issue tried or triable in said cause under the pleadings therein filed. Respondent avers, as appears from the exhibits annexed to the bill of complaint, that the caveat filed by the said O. Robert Hungerford included an allegation that the said Julia M. Hungerford was domiciled in the State of New York at the time of her death, and was temporarily visiting in Fulton County, Georgia; that the said Julian Riley and Hughes Spalding moved to strike said averment from the caveat upon the ground, among others, that "the same does not purport to offer or advance any issuable fact or ground or reason for refusing to probate the will," as appears from the copy of said motion in Exhibit B to the bill of complaint. Pursuant to said motion, said allegation was stricken from said caveat, as appears in said Exhibit B, and this respond-
[fol. 139] ent avers that by reason thereof the said Julian

Riley and Hughes Spalding are now estopped to claim that the fact of the decedent's domicile was an issue which was tried or triable in said cause in said Superior Court. Notwithstanding this fact, said Superior Court directed the jury to include in its verdict a finding that said decedent was domiciled in Fulton County, Georgia, at the time of her death, which finding this respondent avers is wholly void and in no wise binding on this respondent, on the courts of the State of New York, or on the courts of the State of Delaware.

14. For answer to paragraph 14 of said bill of complaint, this respondent refers to the record of certain proceedings of the Court of Ordinary of Fulton County, Georgia, set forth in Exhibit C to said bill of complaint, and admits that said Exhibit C is a true and correct copy of the record of said proceedings.

15. This respondent admits the allegations of paragraph 15 of said bill of complaint, except that this respondent avers that the record of the proceedings in the Superior Court of Fulton County is not a complete record thereof, as set forth in paragraph 13 of this answer. This respondent further avers that said motion for a new trial was overruled by said Superior Court, and that an appeal was duly taken from the judgment of said Court to the Supreme Court of the State of Georgia, and the cause is now pending in said Supreme Court on appeal.

16. For answer to paragraph 16 of said bill of complaint, this respondent admits that the said O. Robert Hungerford filed an application in the Surrogate's Court of the County of New York, State of New York, seeking the appointment of a temporary administrator by said Court for the estate of the said Julia M. Hungerford, for the reasons set forth in said petition.

For further answer to said paragraph 16 of said bill of complaint, this respondent refers to the record of said [fol. 140] proceedings hereinafter referred to and set forth at length in this answer.

17. For answer to paragraph 17 of said bill of complaint, this respondent admits that the said O. Robert Hungerford caused to be sent to the complainant herein, and to other persons and corporations, a notice substantially in the form

set forth in said paragraph 17, and further avers that said notice was proper and fully warranted under the law and facts of the case.

18. For answer to paragraph 18 of said bill of complaint, this respondent refers to the copies of the record of certain proceedings of the Superior Court of Fulton County, Georgia, set forth in Exhibit D to said bill of complaint, and admits that Exhibit D is a true and correct copy of the record of said proceedings. Respondent avers, however, that neither it nor the said O. Robert Hungerford has been lawfully made a party to said proceedings, or served with process therein, or is in any way bound by any of the proceedings had thereunder. Respondent avers that the attempted service by publication upon this respondent in said proceedings is wholly void and ineffectual, and further avers that the attempt of the complainants in said proceedings to bind this respondent by any orders or decrees in personam in said proceedings, with respect to the property involved in the present suit, would amount, if successful, to a deprivation of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. Respondent further avers that said Superior Court of Fulton County was without any jurisdiction or power whatsoever to issue or render any of said orders and decrees set forth in said Exhibit D.

Respondent further avers that it is immaterial to any issue in this cause whether or not the said O. Robert Hungerford was or is bound or concluded by any orders or decrees in said proceedings in the Superior Court of Fulton County referred to in said paragraph 18 of said bill of complaint, or [fol. 141] will be bound by such orders or decrees as may hereafter be made by said court in said proceedings. Respondent avers, however, that, in any event, the said O. Robert Hungerford is not bound or concluded in any respect by any order or decree in said proceedings, for the reason that he was never served with process in said proceedings, and said Superior Court of Fulton County was without any jurisdiction or power to make any of said orders or decrees. Respondent further avers that the said proceedings in equity in said Superior Court of Fulton County were not, in fact or in law ancillary to the proceedings and probate of will of the decedent, and that the attempt to bind the said O. Robert Hungerford by any of said orders or decrees would

amount to a deprivation of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

19. For answer to paragraph 19 of said bill of complaint, this respondent refers to the copy of the record of certain proceedings of the Superior Court of Fulton County, Georgia, set forth in Exhibit D to said bill of complaint, and admits that the said Exhibit D is a true and correct copy of the record of said proceedings. This respondent avers, however, that said proceedings were wholly void and ineffectual in law, for the reasons set forth in paragraph 18 of this answer.

20. For answer to paragraph 20 of said bill of complaint, this respondent admits that the proceedings of the Surrogates Court of the State of New York resulted in the appointment of this respondent as temporary administrator of the estate of Julia M. Hungerford, deceased, and further admits that the Tax Commissioner of the State of New York appeared in said cause and sought the appointment of such administrator to protect the claim of the State of New York to inheritance and succession taxes in respect to the estate of the said Julia M. Hungerford.

For further answer to said paragraph 20, this respondent refers to the record of said proceedings in the Surrogates [fol. 142] Court of the State of New York, hereinafter set forth at length. This respondent denies that the application for the appointment of a temporary administrator in the Surrogates Court of the State of New York was an ex parte application, and avers that service of the citation and summons in said proceeding was duly effected, as provided by the laws of the State of New York.

21. For answer to paragraph 21 of said bill of complaint, this respondent refers to the copy of the record of certain proceedings in said Superior Court of Fulton County, Georgia, set forth in Exhibit D to said bill of complaint, and admits that Exhibit D is a true and correct copy of the record of said proceedings. This respondent avers, however, that the orders and decrees in said proceedings, in so far as the same attempted to compel this respondent to litigate the subject matter of this action in the Superior Court of Fulton County, Georgia, were wholly void and of no effect, for the reason hereinabove stated in paragraph 18 of this answer.

22. For answer to paragraph 22 of said bill of complaint, this respondent refers to the copies of the record of certain proceedings of the Superior Court of Fulton County, Georgia, set forth in Exhibit D to said bill of complaint, and admits that said exhibit is a true and correct copy of the record of said proceedings. This respondent denies, however, that any order or decree in said proceedings is in any way binding upon this respondent in respect of the subject matter of this suit, for the reasons hereinbefore set forth in paragraph 18 of this answer.

23. This respondent denies the allegations of paragraph 23 of said bill of complaint, except that this respondent has no knowledge whether said Julian Riley and Hughes Spalding are ready, able or willing to pay any taxes or other charges incident to the transfer of said shares of stock, and demands proof thereof.

[fol. 143] 24. This respondent denies the allegations of paragraph 24 of said bill of complaint.

25. This respondent denies the allegations of paragraph 25 of said bill of complaint.

26. This respondent denies the allegations of paragraph 26 of said bill of complaint.

27. For further answer to said bill of complaint this respondent avers as follows:

On or about June 12, 1932, the said Julia M. Hungerford, then Julia M. Whitehead, and the said O. Robert Hungerford intermarried in the State of Maryland while they were on a temporary visit in said State. At that time the said Julia M. Whitehead was a resident of the City of Atlanta, Fulton County, Georgia, and the said O. Robert Hungerford was a resident of and domiciled in the City of New York, County and State of New York. For many years prior thereto the said O. Robert Hungerford had maintained his domicile in the City of New York, had registered and voted in said City, had performed jury duty in said City, and in many other ways evidenced his intent to maintain his domicile in the City of New York. This respondent avers that when the said Julia M. Whitehead married the said O. Robert Hungerford, she thereafter took his domicile as her domicile, and that his domicile, to-wit, the State of New York, remained her domicile up to the time of her death. The said O. Robert Hungerford and Julia M. Hungerford

never separated or became divorced, but continued to live together as man and wife up to the time of the death of Julia M. Hungerford. At no time since said marriage has the said O. Robert Hungerford taken or acquired any domicile other than the State of New York, and at no time has the said O. Robert Hungerford since said marriage evidenced any intention of changing his domicile or of acquiring any domicile out of the State of New York. At the time of her death in Atlanta, Georgia, the said Julia M. Hungerford was not a resident of the State of Georgia, nor was she [fol. 144] in any respect domiciled in the State of Georgia. She and her husband having gone to Atlanta on a temporary visit on account of a serious illness of her mother.

Respondent therefore avers that the Courts of the State of Georgia have no power or authority to appoint domiciliary executors for the estate of the said Julia M. Hungerford, or to administer any part of said estate except such part of her estate as may be represented by real estate within the State of Georgia. Respondent further avers that the only State having authority through its Courts to appoint a general domiciliary representative of the estate of Julia M. Hungerford is the State of New York, the State of the domicile of the decedent. Your respondent further avers that it has been appointed such general domiciliary representative of said estate by appropriate proceedings in the Courts of the State of New York having general jurisdiction of probate matters by virtue of the proceedings hereinafter set out.

Respondent further avers that Section 113-706 of the Code of Georgia, in full force and effect at the time of the death of the said Julia M. Hungerford, and at all times since in full force and effect, provides as follows:

"if the executor named in any foreign will is a citizen of this State he shall offer the same for probate as in case of domestic wills and letters testamentary shall issue accordingly."

Respondent further avers that Section 113-701 of the Code of Georgia, in full force and effect at the time of the death of the said Julia M. Hungerford, and at all times since in full force and effect, provides as follows:

"All wills conveying property in this State executed by persons residing out of the State shall be held and treated as foreign wills."

Respondent accordingly avers that it was the duty of the said Julian Riley and Hughes Spalding to offer said last [fol. 145] will and testament of Julia M. Hungerford for probate in the State of Georgia, and that for this reason alone the courts of the State of Georgia hereinbefore referred to had jurisdiction to admit said will to probate, and that said jurisdiction is and was wholly independent of the domicile of the said Julia M. Hungerford.

28. Respondent further avers that the said Julia M. Hungerford was, in fact and in law, at the time of her death a resident of and domiciled in the State of New York; that by due and lawful proceedings in the Surrogates Court of the County of New York this respondent was duly appointed temporary administrator of the estate of the said Julia M. Hungerford, deceased, by decree of said court entered January 22, 1936. This respondent avers that there are creditors of said estate residing and domiciled in the State of New York who are interested in the proper and lawful administration of said estate. A copy of an exemplified copy of said proceedings is hereto attached, marked Exhibit A, and made a part of this answer. A copy of a certificate of the Clerk of said Surrogates Court, evidencing the issuance of Letters of Administration on said estate, to this respondent, is hereto attached, marked Exhibit B, and made a part of this answer.

Respondent further avers that following the issuance to it of Letters of Administration, the State Tax Commission of the State of New York filed in said Court a certain petition praying that the last will and testament of Julia M. Hungerford be admitted to probate and that this respondent be granted Letters of Administration of said estate with the will annexed. A copy of said petition and of the Surrogate's order of July 3, 1936, thereon, and of the citation issued pursuant to said order, are hereto attached, marked Exhibit C, and made a part of this answer.

Respondent further avers that under the statutes of the State of New York now in full force and effect, and in full force and effect at all times since the death of the said Julia [fol. 146] M. Hungerford, a temporary administrator of the estate of the decedent is vested by law with the right to possession and control over and to exercise all manner of dominion over all of the goods and chattels and personal property of every kind and description of the estate of a decedent; and that this respondent, by virtue of its appoint-

ment as temporary administrator of the estate of Julia M. Hungerford, is entitled to the possession of the shares of Coca-Cola International Corporation mentioned and described in the bill of complaint herein. A copy of said statutes of the State of New York is hereto attached, marked Exhibit D, and made a part of this answer.

Wherefore, this respondent, having fully answered said bill of complaint, and having set forth its rights, title and interest in and to the said shares of Coca-Cola International Corporation mentioned and described in said bill of complaint, prays as follows:

1. That Coca-Cola International Corporation may be directed by decree of this Court to transfer on its books into the name of this respondent, as temporary administrator of the estate of Julia M. Hungerford (or into the name of this respondent as administrator with the will annexed, when this respondent shall be so appointed), the shares of stock forming the subject matter of the bill of interpleader filed by said Coca-Cola International Corporation, and to issue and deliver to this respondent new certificates for said shares of stock.

2. That said Coca-Cola International Corporation may be directed by decree of this Court to pay over and deliver to this respondent, as temporary administrator as aforesaid, all dividends that shall have been declared upon said shares of stock prior to the entry of said decree and since the date of the death of said Julia M. Hungerford.

[fol. 147] 3. That this respondent may have such other and further relief as to the Court may seem proper.

The New York Trust Company, By A. M. Massie, Vice-President.

Attest: J. W. Connor, Assistant Secretary. (Corporate Seal.)

Clarence A. Southerland, Solicitor for The New York Trust Company, temporary administrator of the estate of Julia M. Hungerford.

[fol. 148] EXHIBIT "A" TO ANSWER

(Defendants Exhibit No. 15)

The People of the State of New York By the Grace of God Free and Indepeudent

To all to whom these presents shall come or may concern, Greeting:

Know Ye, That we having examined the records and files in the office of the Surrogate of the County of New York, do find there remaining, a certain record of Petition, Citation, Affidavits and Order in the matter of the application for temporary letters of administration, upon the estate of Julia Murphy Hungerford, deceased.

(Petition, filed January 15th, 1936.)

(Seal.)

A. 3426-1935 in the words and figures following, to-wit:

SURROGATES' COURT,
New York County:

In the Matter of Application for Temporary Letters of Administration on the Goods, Chattels and Credits of JULIA MURPHY HUNGERFORD, Deceased

To the Surrogates' Court of the County of New York:

The petition of O. Robert Hungerford, residing at the [fol. 149] Hotel Montclair, New York City, New York, respectfully shows:

1. That Julia Murphy Hungerford, the above named decedent, died in the City of Atlanta, Georgia, on the 28th day of November, 1935, and was a resident of the County and State of New York, at the time of her death.

2. That the said decedent died without leaving any valid last will and testament to the best of petitioner's knowledge, information and belief.

3. That your petitioner is of full age and is the husband of the decedent.

4. That a search of the records of this Court made by Francis A. Fullam, Jr., New York City, New York, on the

18th day of December, 1935, shows that no application has ever been made for letters of administration upon the estate of the said decedent or for the probate of a will of said decedent or for the probate of a will of said decedent or for letters testamentary thereupon, and your petitioner is informed and verily believes that no such application has ever been made to the Surrogate's Court of any other county of this State.

5. That your petitioner is informed that a paper purporting to be the last will and testament of the decedent has been probated in common form in the Court of Ordinary at Atlanta, Georgia, upon the testimony of a single subscribing witness and without notice to your petitioner or any other party interested in the estate of the decedent. Your petitioner is further informed that said paper purporting to be last will and testament of said decedent has been offered for probate in solemn form in said Court of Ordinary for proof by all the witnesses to said purported will after notice to all the heirs at law, but no hearing has yet been had thereon. Your petitioner, however, denies the validity of said purported will.

[fol. 150] 6. That, as your petitioner is informed and believes, the value of the personal property of which the decedent died possessed does not exceed the sum of $850,000, and consists largely of stocks and bonds, the location of which is unknown to your petitioner, except that your petitioner believes that the certificates representing a portion of said stocks are in the State of Georgia.

7. That, as your petitioner has been advised by Marion A. Smith and J. R. Bowden, attorneys of the State of Georgia, and verily believes, the courts of Georgia have no jurisdiction to admit to probate the will of a non-resident decedent, except as it affects real property in Georgia and an appointment of legal representatives of the estate of the decedent by the courts of Georgia is wholly ineffective as to personal property owned by decedent, who was a non-resident of said State, that there is no representative of decedent's estate legally authorized to collect and receive the interest and dividends on the stocks and bonds owned by the said estate and there can be no legal representative authorized to receive said income until one is appointed by the courts of the State of decedent's residence, to wit: New York.

8. In order to prevent the payment of interest and dividends on bonds and stocks held by said estate to representatives appointed by the court in Georgia, who are without legal right or authority to collect or receive the same, it is necessary that temporary letters of administration be granted by this Court.

9. That decedent owned no real property in the State of New York at the time of her death.

10. That your petitioner, as the husband of the said decedent, is entitled to administration upon the estate of said decedent.

[fol. 151] 11. That said deceased left surviving the following distributees, whose names, degrees of relationship, post office addresses and ages are as follows:

Name	Relationship	Post Office Address	Age
Julia Murphy	Mother	1197 Peachtree St. Atlanta, Georgia	Over 21
Katherine Riley	Sister	1197 Peachtree St. Atlanta, Georgia	Over 21
O. Robert Hungerford	Husband	Hotel Montclair New York City	Over 21

12. That there are no other persons than those hereinabove mentioned interested in this proceeding.

13. That the above named decedent left her surviving no husband, no child or children, no child or issue of a deceased child, no adopted child or children, no issue of any deceased adopted child or children, no father, mother, brother or sister of the half or whole blood, no issue of a deceased brother or sister, no grandparents, other than those above named.

14. That the names of the Executors designated in said paper purporting to be the last will and testament of the said decedent, as your petitioner is informed and believes are as follows:

Julian G. Riley	1197 Peachtree Street Atlanta, Georgia
Hughes Spalding	First National Bank Building Atlanta, Georgia

15. That all of the persons hereinabove named in paragraphs 11 and 14 of this petition are of full age and sound mind.

16. The said deceased was in her lifetime a citizen of the United States.

[fol. 152] Wherefore, your petitioner prays for an order or decree awarding temporary letters of administration to The New York Trust Company and for the issuance of a citation directed to the said Julia Murphy and Katharine Riley be made by publication or, at the option of the petitioner, by delivering a copy of the citation to the persons so cited in person without the State, and for such further or other order in relation to such temporary letters of administration or the service of said citation as may be just and proper.

Dated, December 19th, 1935.

O. Robert Hungerford, Petitioner.

STATE OF NEW YORK,
County of New York, ss:

O. Robert Hungerford, the above named petitioner, being duly sworn, doth depose and say, that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and to those matters he believes it to be true.

O. Robert Hungerford.

Sworn to before me this 19th day of December, 1935. Helen G. Wilkinson, Notary Public. New York County. N. Y. Co. Clerks No. 152. Reg. No. 6-W-241. Commission expires March 30, 1936. (Notarial Seal.)

[fol. 153] SURROGATE'S COURT, NEW YORK COUNTY

In the Matter of the Application for Temporary Letters of Administration on the Goods, Chattels and Credits of JULIA MURPHY HUNGERFORD, Deceased

CONSENT OF TEMPORARY ADMINISTRATOR

To the Surrogate's Court of the County of New York:

The New York Trust Company, a corporation organized under the Banking Law of the State of New York and hav-

ing its principal office at No. 100 Broadway, New York City, New York, hereby consents to act as Temporary Administrator of the goods, chattels and credits of Julia Murphy Hungerford, late of the City, County and State of New York, according to law.

The New York Trust Company, by B. G. Curts, Vice-President.

Attest: (Sgd.) C. Cobb, Ass't. Secretary. (Corporate Seal.)

[fol. 154] State of New York,
County of New York, ss:

Be it Known that on the 19th day of December, 1935, before me came Boyd G. Curts, to me known, and being by me duly sworn, did depose and say that he resides in Brooklyn, New York; that he is a Vice-President of The New York Trust Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees and that he signed his name thereto by like order.

Carl H. Bruns, Notary Public. Notary Public, Nassau County No. 138 Ctf. filed in New York County, No. 1174, Reg. No. 6-B-718, Ctf. filed in Kings County No. 279, Reg. No. 6462. Commission expires March 30, 1936. (Notarial Seal.)

Surrogates' Court, New York County

In the Matter of the Application for Temporary Letters of Administration on the Goods, Chattels and Credits of Julia Murphy Hungerford, Deceased

Designation of the Clerk to Receive Service

The New York Trust Company, the Temporary Administrator about to be appointed of the goods, chattels and credits of Julia Murphy Hungerford, late of the City, County and State of New York, does hereby designate the [fol. 155] Clerk of the Surrogates' Court of the County of New York, and his successor in office as a person on

whom service of any process issuing from the Surrogate's Court of the County of New York, may be made in like manner and with like effect, as if they were personally served upon it, whenever it cannot be found and served in the State of New York, after due diligence is used.

The undersigned is a corporation organized under the Banking Law of the State of New York, having its principal office at No. 100 Broadway, Borough of Manhattan, City, County and State of New York.

The New York Trust Company, by B. G. Curts, Vice-President.

Attest: (Sgd.) C. Cobb, Assistant Secretary. (Corporate Seal.)

STATE OF NEW YORK,
County of New York, ss:

Be it Known that on the 19th day of December, 1935, before me came Boyd G. Curts, to me known and, being by me duly sworn, did depose and say that he resides in Brooklyn, New York; that he is a Vice-President of The New York Trust Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees and that he signed his name thereto by like order.

[fol. 156] Carl H. Bruns, Notary Public. Notary Public, Nassau County No. 138; Ctf. filed in New York County No. 1174; Reg. No. 6-B-718; Ctf. filed in King's County No. 279; Reg. No. 6462. Commission expires March 30, 1936. (Notarial Seal.)

CITATION

The People of the State of New York by the Grace of God Free and Independent to Julia Murphy, Julian G. Riley and Hughes Spalding Send Greeting:

Upon the petition of O. Robert Hungerford, who resides at Hotel Montclair, Lexington Avenue and 48th Street, New York City, New York, you and each of you are hereby cited to show cause before the Surrogates' Court of New

York County, held at the Hall of Records in the County of New York on the 21st day of January, 1936, at half past ten o'clock in the forenoon of that day, why a decree should not be entered awarding temporary Letters of Administration on the goods, chattels and credits of Julia Murphy Hungerford, deceased, late of New York County, to The New York Trust Company.

In Testimony Whereof, we have caused the seal of the Surrogates' Court of the said County of New York to be hereunto affixed.

Witness, Honorable James A. Delehanty, a Surrogate of our said County, at the County of New York, the 24th day of December in the year of Our Lord one Thousand nine hundred thirty-five.

Charles P. Sheridan, Clerk of the Surrogates Court.
(Seal.)

[fol. 157] SURROGATES' COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

In the Matter of the Application for Temporary Letters of Administration on the Goods, Chattels and Credits of JULIA MURPHY HUNGERFORD, Deceased

STATE OF GEORGIA,
County of Fulton, ss:

Julian E. Gortatowsky, being duly sworn, deposes and says:

1. That he resides at No. 1156 Springdale Rd. N. E., Atlanta, Georgia, is over the age of 21 years and is not a party to the above entitled action.

2. That he served the citation herein dated December 24, 1935, and the order herein dated December 24, 1935, for service of said citation without the State upon the following named persons, at the times and places indicated with respect to each of said persons:

(a) On the 27th day of December, 1935, at approximately 10:25 A. M. upon Julian G. Riley in offices of Spalding, Silbey, Trautman & Brack, at 1514 First National Bank Building, Atlanta, Ga.

(b) On the 27th day of December, 1935, at approximately 10:25 A. M. upon Hughes, Spalding, in offices of Spalding, Silbey, Trautman & Brack, at 1514 First National Bank Building, Atlanta, Ga., by delivering to and leaving with each of said persons, personally, on the dates and at the times and places above indicated with respect to each of [fol. 158] said persons, a true copy of each of said citation and said order.

3. That he knew each of said persons so personally served as described above to be the persons mentioned in said citation and order and they and each of them admitted to him that they were said persons.

Julian E. Gortatowsky.

Subscribed and sworn to before me this 27th day of December, 1935. Marie Cooper, Notary Public, Fulton County, Georgia. My commission expires September 20, 1936. (Notarial Seal.)

STATE OF GEORGIA,
Fulton County:

I, J. W. Simmons, Clerk of the Superior Court of said County, which Court is a court of record, do hereby certify that Marie Cooper is a duly appointed Notary Public in and for said State and County, and that he was appointed on the 21st day of September, 1932, and that his commission as such Notary expires with the 20th day of September, 1936, and that he resides in said County of Fulton.

I further certify that I am acquainted with the Signature of the said Marie Cooper as such Notary Public to the instrument hereto attached; that the same is genuine, and that, under the laws of Georgia, he is authorized to attest Deeds and instruments for record, take acknowledgements and administer oaths.

I further certify that the impression of the official seal of said Marie Cooper is not required by law to be filed in this office.

[fol. 159] In witness of all of which, I hereunto subscribe my name and affix the Seal of this Court, this the 2nd day of January, 1936.

J. W. Simmons, Clerk of the Superior Court of Fulton County, Ga.

SURROGATES' COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

In the Matter of the Application for Temporary Letters of Administration on the Goods, Chattels and Credits of JULIA MURPHY HUNGERFORD, Deceased

STATE OF GEORGIA,
County of Fulton, ss:

W. S. Elkin, being duly sworn, deposes and says:

1. That he resides at No. 659 Peachtree Street, N. E., Atlanta, Georgia, is over the age of 21 years and is not a party to the above entitled action.

2. That he served the citation herein dated December 24, 1935, and the order herein dated December 24, 1935, for service of said citation without the State upon the following named person, at the time and place indicated:

(a) On the 31st day of December, 1935, at approximately 9:30 A. M. upon Julia Murphy, by delivering to and leaving with said person, personally, at her home, 1197 Peachtree St. N. E., Atlanta, Ga., on the date and at the time above indicated, a true copy of each of said citation and said order.

[fol. 160] 3. That he knew said person so personally served as described above to be the person mentioned in said Citation and order and she admitted to him that she was said person.

W. S. Elkin.

Sworn to and subscribed before me this 31st day of December, 1935. A. G. Nicolessen, Notary Public, Fulton County, Ga. My commission expires April 17, 1938. (Notarial Seal.)

STATE OF GEORGIA,
County of Fulton, ss:

I, Ella May Thornton, State Librarian of the State of Georgia, and officer designated by the Legislature of Georgia (Acts 1916, Page 137) to appoint and commission Notaries Public for and in the State at large, do hereby certify that A. G. Nicolassen by whom the foregoing acknowl-

edgement was taken, and whose signature is subscribed thereto, was at the time of taking the same a Notary Public in and for the State at large of the State of Georgia, duly commissioned and sworn and authorized by the laws of said State to take proof or acknowledgement of deeds and other instruments in writing to be recorded in said State, and to administer oaths or affirmations in said State and that I am well acquainted with his handwriting and verily believe that the signature to the foregoing certificate is genuine.

In Witness Whereof I have hereunto set my hand and affixed my official seal the 2nd day of January, 1936.

[fol. 161] Ella May Thornton, State Librarian of Georgia. (State Librarian Seal.)

At chambers of the Surrogates' Court held in and for the County of New York at the Surrogates' Office in the Borough of Manhattan, City of New York, on the 24th day of December, 1935.

Present: Hon. James A. Delehanty, Surrogate.

A-3426, 1935

In the Matter of the Application for Temporary Letters of Administration on the Goods, Chattels and Credits of Julia Murphy Hungerford, Deceased

Order for Service without the State

Upon filing the verified petition of O. Robert Hungerford, praying for Temporary Letters of Administration of the goods, chattels and effects of Julia Murphy Hungerford, late of New York County, deceased, by which the petitioner has made proof to my satisfaction that Julia Murphy is a distributee of the said Julia Murphy Hungerford, deceased, and that Julian G. Riley and Hughes Spalding are executors named in a paper purporting to be a Last Will and Testament of the said decedent and are not residents of this State; that personal service of the citation herein cannot with due diligence be made upon them within the [fol. 162] State, now on motion of Baldwin, Hutchins & Todd, attorneys for said petitioner, it is

Ordered that the service of the citation in the above entitled matter upon the aforesaid persons be made by deliv-

ering to and leaving with each of them in person a true copy of the citation without the State.

J. A. D., Surrogate.

At a Surrogates' Court, held in and for the County of New York, at the Hall of Records, Borough of Manhattan, New York City, on the 22nd day of January, 1936.

Present: Honorable James A. Foley, Surrogate.

A-3426. 1935

In the Matter of the Application for Temporary Letters of Administration on the Goods, Chattels and Credits of JULIA MURPHY HUNGERFORD, Deceased

ORDER GRANTING LETTERS OF TEMPORARY ADMINISTRATION

Upon reading and filing the petition of O. Robert Hungerford, verified the 19th day of December, 1935, for the awarding of temporary letters of administration to The New York Trust Company, the consent and designation of said The New York Trust Company, the citation duly issued herein on the 19th day of December, 1935 and the order made and entered herein on the 19th day of December, 1935 directing service of said citation to be made on [fol. 163] Julia Murphy, distributee, and Julian G. Riley and Hughes Spalding, Executors, named in a paper purporting to be a Last Will and Testament of the decedent herein, by delivering to and leaving with each of said persons, in person, a true copy of said citation without the State, and upon due proof of such service of said citation pursuant to said order; and this cause having come on regularly to be heard on the 21st day of January, 1936, and the State Tax Commission of New York having appeared and joined in the prayer for awarding temporary letters of administration, and no one having appeared in opposition,

Now, on motion of Baldwin, Hutchins & Todd, attorneys for petitioners, it is

Ordered that temporary administration on the goods, chattels and credits of Julia Murphy Hungerford, late of the County of New York, deceased, be and the same hereby is granted to The New York Trust Company, and that letters of temporary administration upon said goods, chattels

and credits of said decedent issue forthwith to said The New York Trust Company, upon its qualifying according to law.

James A. Foley, Surrogate.

All which we have caused by these presents to be exemplified, and the Seal of our said Surrogates' Court to be hereunto affixed.

Witness Honorable James A. Delehanty, a Surrogate of the County of New York, at the City of New York, the 26th day of June, in the year of our Lord one thousand nine hundred and thirty-six, and of our independence the one hundred and sixtieth.

George Loesch, Deputy Clerk of the Surrogates' Court. (Seal.)

A.284673.

[fol. 164] I, James A. Delehanty, a Surrogate of said County and presiding Magistrate of the Surrogate's Court do hereby certify that George Loesch, whose name is subscribed to the preceding exemplification, is the Deputy Clerk of said Surrogate's Court of the County of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogate's Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York, June 26, 1936.

James A. Delehanty, Surrogate.

STATE OF NEW YORK,
County of New York, ss:

I, George Loesch, Deputy Clerk of the Surrogate's Court of the County of New York, do hereby certify that Honorable James A. Delehanty, whose name is subscribed to the preceding certificate, is the presiding Magistrate of the Surrogate's Court of the County of New York, duly elected, sworn and qualified, and that the signature of said Magistrate to said certificate is genuine.

In Testimony Whereof, I have hereto set my hand and affixed the seal of the said Court, this 26th day of June, 1936.

George Loesch, Deputy Clerk of the Surrogate's Court. (Seal.)

[fol. 165] EXHIBIT "B" TO ANSWER

(Defendants Exhibit No. 16)

The People of the State of New York to All to Whom These Presents Shall Come or May Concern, Send Greeting:

Know Ye, That we, having inspected the Records of our Surrogate's Court, in and for the County of New York, do find that on the 22nd day of January in the year one thousand nine hundred and thirty-six, by said Court, Temporary Letters of Administration of the goods, Chattels and credits of Julia Murphy Hungerford, late of the County of New York, deceased, were granted unto The New York Trust Company of the County of New York, and that it does not appear by said Records that said Letters have been revoked.

In Testimony Whereof, we have caused the Seal of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Hon. James A. Foley, a Surrogate of our said County, in the City of New York, the 22nd day of January in the year of our Lord one thousand nine hundred and thirty-six.

Charles P. Sheridan, Clerk of the Surrogate's Court.

(Seal.)

EXHIBIT "C" TO ANSWER

(Defendants Exhibit No. 17)

The People of the State of New York by the Grace of God Free and Independent to All to Whom These Presents Shall Come or May Concern, Greeting:

To All to Whom These Presents Shall Come or May Concern, greeting:

Know Ye, That we having examined the records and [fol. 166] files in the office of the Surrogate of the County of New York, do find there remaining, a certain record of Petition for probate of will in the matter of the estate of Julia M. Hungerford, deceased.

P 1602-1936.
L.

(Seal.)

In the words and figures following, to-wit:

Surrogate's Court, County of New York

Petition for Probate of Will

In the Matter of Proving the Last Will and Testament of JULIA M. HUNGERFORD, Deceased, as a Will of Real and Personal Property

To the Surrogate's Court of the County of New York:

The petitioners, State Tax Commission, by this petition respectfully state:

1. That pursuant to the statutes in such case made and provided, it is the duty of said State Tax Commission to investigate and enforce the payment of the Estate taxes due the State of New York on the transfer of property of decedents.

2. That by reason of the foregoing the State Tax Commission is a party interested in the Estate of Julia M. Hun- [fol. 167] gerford, late of the County of New York, deceased, and makes this petition for probate pursuant to the provisions of the Surrogate's Court Act of the State of New York.

3. That the last will and testament, an exemplified copy of which is herewith presented and hereby offered for probate, relates to both real and personal property and bears date the 12th day of August, 1933, and is signed at the end thereof by said testatrix and John A. Sibley, Sumter M. Kelly and L. E. McKnight as subscribing witnesses.

4. That petitioner does not know of any codicil to said Last Will and Testament, nor is there any to the best of its information and belief.

5. Upon information and belief, that said testatrix was, at the time of her death, a resident of the County of New York temporarily sojourning in the City of Atlanta, in the State of Georgia on the 28th day of November, 1935.

6. Upon information and belief that the husband, all distributees of said testatrix, each person designated in said Will, an exemplified copy of which is herewith presented and hereby offered for probate, as executor, testa-

mentary trustee or guardian, and their residences, post-office addresses, are hereinafter mentioned in subdivisions (a), (b), (c) and (d) hereof, as follows:

(a) The following named persons are of full age and sound mind:

O. Robert Hungerford, husband of deceased, who resides at the Montclair Hotel, Lexington Avenue and 52nd Street, New York City, New York.

Julia G. Murphy, mother of deceased, who resides at 1197 Peachtree Street, Atlanta, Georgia.

Julian Riley, named as executor in the Will of deceased who resides at 1197 Peachtree Street, Atlanta Georgia.

[fol. 168] Hughes Spalding, named as executor in the Will of deceased, who has an office in the First National Bank Building, Atlanta, Georgia.

(b) The following named persons who are infants over the age of fourteen (14) years of age:

None.

(c) The following named persons who are infants under the age of fourteen (14) years of age:

None.

(d) The following named persons who are of full age but of unsound mind:

None.

7. Upon information and belief, that the above named decedent left her surviving no husband, no child or children, no child or issue of a deceased child, no adopted child or children, no issue of any deceased adopted child or children, no father, mother, other than those above named.

8. Upon information and belief, that no petition for the probate of the Will, an exemplified copy of which is herewith presented and hereby offered for probate, or for Letters of Administration on said Estate, has been heretofore filed in this or any other Surrogate's Court of this State, except as follows: That prior to the filing of this petition and on or about the 19th day of December, 1935, O. Robert Hungerford, husband of the deceased, filed a petition in the Surrogate's Court of New York County for the ap-

pointment of a temporary administrator of the Estate of Julia M. Hungerford, deceased, and that thereafter, and pursuant to said petition, a decree was entered therein by said Surrogate's Court, dated the 22nd day of January, 1936, granting Letters of Temporary Administration to the New York Trust Company, No. 100 Broadway, New York City.

[fol. 169] 9. Upon information and belief, that prior to the filing of this petition and on or about the 2nd day of December, 1935, without notice to petitioners, said Julian Riley and Hughes Spalding, the persons named as Executors in said Will, offered the same for probate in common form in the Court of Ordinary, Fulton County, in the State of Georgia, and that thereafter and on or about December 2, 1935, said Court admitted said Will to probate in common form.

10. Upon information and belief, that said Will is filed or recorded in the Court of Ordinary of Fulton County in the State of Georgia, the same being the proper office as prescribed by the laws of the State of Georgia, and that said Will, with the proofs and the records thereof, remains in said Court.

11. Upon information and belief, that the said Julia M. Hungerford, deceased, left real property in Fulton County, in the State of Georgia, and the said Court of Ordinary for Fulton County, State of Georgia, had jurisdiction, irrespective of the domicile of the decedent, to grant probate of the Last Will and Testament of said Julia M. Hungerford, deceased.

12. Upon information and belief, that said Executors named in said Will of Julia M. Hungerford, deceased, have filed no petition for ancillary letters testamentary or ancillary letters of administration under said Will in the courts of the State of New York, nor has any petition for probate of said Will heretofore been filed in this or any other Surrogate's Court of this State.

13. Your petitioners deny that decedent was a resident of the State of Georgia either at the time of the execution of said Will or at the time of her death, and allege that the Will of said decedent should be admitted to original probate by this Court.

14. That there is no person designated in the Will, an exemplified copy of which is herewith presented and hereby [fol. 170] offered for probate, as executor, testamentary trustee or guardian, except as hereinbefore mentioned.

That there is no person named as executor, testamentary trustee, guardian, devisee or beneficiary in any other Will of the same testatrix filed in the Surrogate's Office of the County of New York.

15. That the names and post-office addresses of the devisees, legatees and other beneficiaries named in the Will, herewith presented and hereby offered for probate, are as follows:

(a) The following named legatees, etc. have been hereinbefore mentioned:

Name of Legatee or Devisee	Post Office Address	Value of Legacy or devise
O. Robert Hungerford	Hotel Montclair New York City, N. Y.	$5,000, a diamond link bracelet, a diamond wrist watch and a diamond ring
Katharine M. Riley	1197 Peachtree St. Atlanta, Georgia	one-half of the Residuary estate

(b) The following named legatees, etc. have not been heretofore mentioned, and they are the only persons who are entitled to a notice of probate pursuant to Sect. 146 of the Surrogate's Court Act:

Name of Legatee or Devisee	Post Office Address	Value of Legacy or devise
Julia G. Murphy	1197 Peachtree St. Atlanta, Georgia	one-half of the Residuary estate

[fol. 171] 16. Upon information and belief, that the value of the entire estate of the decedent is over $500,000. That the value of the real property in this State of which the testatrix died seized is no dollars, and that the value of

the personal property of which said testatrix died possessed is over $500,000, consisting principally of stock and bonds.

17. That there are no persons interested in this proceeding other than those hereinbefore mentioned.

Wherefore, your petitioner prays:

That a citation to show cause issue herein to the persons hereinbefore named, described and included in subdivisions (a), (b), (c) and (d) of paragraph 7 hereof and to The New York Trust Company, as Temporary Administrator of the estate of Julia M. Hungerford, deceased, citing them to show cause why the Last Will and Testament, exemplified copy of which is herewith presented and hereby offered for probate, should not be admitted to probate;

That an order be granted directing the service of the citation personally without the State or by publication upon the persons hereinbefore named, described and included in sub-divisions (a), (b), (c) and (d) of paragraph 7 hereof who are not residents of the State of New York, and also upon the persons hereinbefore described and included in those subdivisions who, and whose names or residences and post-office addresses, are unknown and cannot be ascertained; and

That the Last Will and Testament, an exemplified copy of which is herewith presented and hereby offered for probate, may be admitted to probate as a Will of personal property, and that letters of administration with the Will annexed of the goods, chattels and credits of said testatrix may be grant-d to The New York Trust Company or such other person as the surrogate may appoint and that all the persons aforesaid having a prior or equal right to such administration may be cited to show cause why such let-
[fol. 172] ters should not be granted.

Dated: New York, N. Y. June 12, 1936.

State Tax Commission, by Edgar Hirschberg, Attorney in fact.

STATE OF NEW YORK,
County of New York, ss.

Edgar Hirschberg, Attorney in fact for the petitioner named in the foregoing petition, being duly sworn, deposes and says:

That he has read the foregoing petition subscribed by him and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

Edgar Hirschberg.

Sworn to before me this 12th day of June, 1936. Mary J. MacMillan, Notary Public Kings Co., No. 268, Kings County Register's No. 8217, Certificate filed New York Co. No. 154, New York Registers No. 8-M-268 Certificate Filed Westchester Co. Clerks Cert. filed in Westchester Registers. My commission expires March 30, 1938. (Notarial seal.)

All which we have caused by these presents to be exemplified, and the Seal of our said Surrogate's Court to be hereunto affixed,

[fol. 173] Witness Honorable James A. Delehanty, a Surrogate of the County of New York, at the City of New York, the 2nd day of July, in the year of our Lord one thousand nine hundred and thirty-six and of our independence the one hundred and sixtieth.

George Loesch, Deputy Clerk of the Surrogate's Court. (Seal.)

A 285001.

I, James A. Delehanty, a Surrogate of said County and presiding Magistrate of the Surrogate's Court do hereby certify that George Loesch, whose name is subscribed to the preceding exemplification, is the Deputy Clerk of said Surrogate's Court of the County of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogate's Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York, July 2nd, 1936.

James A. Delehanty, Surrogate.

State of New York,
County of New York, ss:

I, George Loesch, Deputy Clerk of the Surrogate's Court of the County of New York, do hereby certify that Honor-

able James A. Delehanty, whose name is subscribed to the preceding certificate, is the presiding Magistrate of the Surrogate's Court of the County of New York, duly elected, sworn and qualified, and that the signature of said Magistrate to said certificate is genuine.

In Testimony whereof, I have hereto set my hand and affixed the seal of the said Court, this 2nd day of July, 1936.

George Loesch, Deputy Clerk of the Surrogate's Court. (Seal.)

[fol. 174] At Chambers of the Surrogates' Court held in and for the County of New York at the Surrogates' Office in the Borough of Manhattan, City of New York, on the 3rd day of July, 1936.

Present: Honorable James A. Foley, Surrogate.

In the Matter of Proving the Last Will and Testament of Julia M. Hungerford, Deceased, as a Will of Real and Personal Property

P-1602/1936. Order for Service of Citation by Publication

A duly verified petition having been presented to and filed in the Surrogates' Court in the County of New York, by the State Tax Commission of the State of New York, as a party interested in the Estate of Julia Murphy Hungerford, deceased, praying for the probate of the Will of said decedent and for the issuing of a citation thereupon, and a citation having been duly issued thereon, and it appearing to my satisfaction by said petition of the State Tax Commission that Julia G. Murphy, a distributee, and Katharine M. Riley, a person named as a legatee, in the said Will of decedent and entitled to be cited, and Julian Riley and Hughes Spalding, persons named as executors in said Will of said Julia Murphy Hungerford, deceased, are all non-residents of this State, residing as follows, to-wit:

[fol. 175] Julia G. Murphy, 1197 Peachtree Street, Atlanta, Georgia, Katharine M. Riley, 1197 Peachtree Street, Atlanta, Georgia, Julian Riley, 1197 Peachtree Street, Atlanta, Georgia, Hughes Spalding, First National Bank Building, Atlanta, Georgia,

I do hereby Order and direct that the service of citation herein upon Julia G. Murphy, Katherine M. Riley, Julian

Riley and Hughes Spalding, be made by publication thereof in two newspapers, to wit: The New York Law Journal and in the Journal of Commerce, being two newspapers printed and published in the County of New York, once in each of four successive weeks, which is the time I deem reasonable; or, at the option of said Petitioner, by delivering a copy of the said petition, without the State, to the said Julia G. Murphy, Katherine M. Riley, Julian Riley and Hughes Spalding, in person; and I do further

Order and direct that, in or before the day of first publication, the petitioner herein deposit in the Post Office in the City of New York, four sets of copies of the said citation and of this order, each set contained in a securely closed, postpaid wrapper, and one of such sets directed to each of the following persons, respectively:

[fol. 176] Mrs. Julia G. Murphy, 1197 Peachtree Street, Atlanta, Georgia, Mrs. Katherine M. Riley, 1197 Peachtree Street, Atlanta, Georgia, Dr. Julian Riley, 1197 Peachtree Street, Atlanta, Georgia, Hughes Spalding, Esq., First National Bank Building, Atlanta, Georgia.

J. A. F., Surrogate.

CITATION

The People of the State of New York, By the Grace of God, Free and Independent, To O. Robert Hungerford and Julia G. Murphy, distributees of Julia Murphy Hungerford, deceased; Katherine M. Riley, a person interested in the Estate of Julia Murphy Hungerford, deceased; Julian Riley and Hughes Spalding, the persons named as Executors in the Last Will and Testament of Julia Murphy Hungerford, deceased; and The New York Trust [fol. 177] Company, as Temporary Administrator of the Estate of Julia Murphy Hungerford, deceased, send greeting:

Whereas, The State Tax Commission of the State of New York has lately applied to the Surrogate's Court of our County of New York, to have a certain instrument in writing, relating to both real and personal property, duly proved as the last will and testament of Julia Murphy Hungerford, deceased, who was at the time of her death a resident of the County of New York,

Therefore, you and each of you are cited to show cause before the Surrogate's Court of our County of New York, at the Hall of records, in the County of New York, on the 15th day of September, one thousand nine hundred and thirty-six at half-past ten o'clock in the forenoon of that day, why the said will and testament should not be admitted to probate as a will of real and personal property of a resident of the County of New York and why a determination should not be made after a trial of the question of the testatrix' legal domicile at the time of her death and whether in the County and State of New York or elsewhere.

In testimony whereof, we have caused the seal of the Surrogate's Court of the said County of New York to be hereunto affixed.

Witness, Honorable James A. Foley, Surrogate of our said County of New York at said County, the 6th day of July, in the year of our Lord one thousand nine hundred and thirty-six.

Charles P. Sheridan, Clerk of the Surrogate's Court.

(Seal.)

[fol. 178] EXHIBIT "D" TO ANSWER

(Defendants Exhibit No. 18)

Extracts from the Surrogate's Court Act of the State of *the* New York

Sec. 15. Exclusive jurisdiction. The surrogate's court of each county has jurisdiction, exclusive of every other surrogate court, to take the proof of a will, and to grant letters testamentary thereupon, or to grant letters of administration, as the case requires, in either of the following cases:

1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.

2. Where the decedent, not being a resident of the state, died within that county, leaving personal property within the state, or leaving personal property which has, since his death, come into the state, and remains unadministered.

3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that

county, and no other; or leaving personal property which has since his death, come into that county, and no other, and remains unadministered; or leaving a cause of action against a resident of that county for damages for a wrongful act or negligence causing the death of the decedent and leaving no property in any other county.

4. Where the decedent was not, at the time of his death, a resident of the state, and a petition for probate of his will, or for a grant of letters of administration, under sub-division two or three of this section, has not been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to disposition [fol. 179] under article thirteen of this act, is situated within that county, and no other.

* * * * * * * *

Sec. 118. Who entitled to letters of administration. Administration in case of intestacy must be granted to the persons entitled to take or share in the personal property, who are competent and will accept the same, in the following order:

1. To the surviving husband or wife.

2. To the children.

3. To the grandchildren.

4. To the father or mother.

5. To the brothers or sisters.

6. To any other next of kin entitled to share in the distribution of the estate, preference being given to the person entitled to take the largest share in the estate, except as hereinafter provided.

If a person entitled to take all the personal estate is an infant, or an incompetent, or has died, his guardian, committee or legal representative, as the case may be, shall have a prior right to letters in his place and stead.

If all the persons entitled to take the personal estate are infants, or adjudged incompetents, or, if no adult or competent person entitled to take or share in the estate will accept the same, letters may be granted to the general guardian of an infant or to the committee of an incompetent, in the place of such infant or incompetent.

If no person entitled to take or share in the estate will accept the same or an appointment is not made by consent as hereinafter provided, then administration shall be granted as follows:

[fol. 180] a. To the public administrator.

b. To the county treasurer of the county, or to the petitioner, in the discretion of the surrogate.

c. To any other person or persons.

If several persons have an equal right to administration there shall be no preference on account of sex, but that person must be appointed, who will, in the judgment of the surrogate, best manage the estate of the intestate. Relatives of the whole blood must be preferred to those of the half blood. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons. Administration may be granted to one or more competent persons, jointly with a person entitled upon the application of a person entitled to take or share in the personal property, or to a competent person or persons not entitled, upon the consent of all the persons entitled to take or share in the estate whether within or without this state and competent, which consent must be in writing, and filed in the office of the Surrogate. For the purposes of this section a trust company or other corporation authorized to act as administrator shall be included in the word "person".

Sec. 120. Citation; proceedings upon return thereof. Every person, being a resident of the State and competent, who has a right to administration prior or equal to that of the petitioner and who has not renounced, must be cited upon a petition for letters of administration; and where the petitioner is not entitled to share in the distribution of the estate there must also be cited all resident infants and adjudged incompetents who are so entitled. The surrogate may, in his discretion, issue a citation to non-residents, or those who have renounced, or to any or all other persons interested in the estate. Where it is not necessary to cite any person, a decree, granting letters may be made on presentation of the petition. Any person who has a right to administration, prior or equal to that of the petitioner may renounce his right by a written instrument, acknowl-

[fol. 181] edged, or proved, and duly certified which must be filed in the surrogate's office; except that a public administrator or county treasurer may not renounce his right by and may only be excused from acting as such upon his motion duly made and upon an order made and entered thereupon by the surrogate.

* * * * * * *

Sec. 56. Service personally without the state, or by publication. The surrogate from whose court a citation is issued or to be issued may make an order directing the service thereof personally without the state, or by publication, in either of the following cases:

1. Where it is to be served upon a foreign corporation, a joint stock association or other unincorporated association having a president and treasurer, neither of whom is a resident of this state or upon a person who is not a resident of the state.

* * * * * * *

Sec. 58. Order, when and how made; contents thereof. 1. When an order, directing the service of a citation personally without the state, or by publication, is made, * * *

If the order authorizes personal service without the State of New York, it must direct that service be made upon the parties named therein in the manner prescribed in section fifty-nine of this act.

* * * * * * *

Sec. 59. Time and manner of service of citation. Any person over eighteen years of age, although a party to the special proceeding may serve a citation.

Service of a citation personally without the state of New York, pursuant to an order therefor, or pursuant to the provisions of section fifty-eight-a of this chapter, must be [fol. 182] made in the same manner as is required by this chapter, for the personal service of a citation within the State, by delivering a copy of such citation, if within the United States at least twenty days, and if without the United States at least thirty days before the return day thereof.

* * * * * * *

Sec. 126. When and how temporary administrators may be appointed. On the application of a creditor, or a person interested in the estate, the surrogate may, in his discretion, issue to one or more persons, letters of temporary administration, in either of the following cases:

1. When for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will.

An appointment of a temporary administrator, in a case specified in this subdivision must be made by an order, if a proceeding for grant of letters of administration or probate of a will is then pending. At least ten days' notice of the application for such an order must be given to each party to the proceeding who has appeared, unless the surrogate is satisfied by proof that the safety of the estate requires the notice to be shortened, in which case he may shorten the time of service to not less than two days, or he may, in a proper case, dispense with such notice. If no proceeding is pending, application shall be by petition and a citation shall issue in the usual manner directed to the persons entitled to letters of administration in a case where no will is known to exist; or to the executor or executors, trustee or trustees if any, and such legatees and devisees as the surrogate may direct to be cited, in cases where a will has been filed.

Such an application for the appointment of a temporary administrator in either case may also be made, with like effect, and in like manner, as if made by a creditor, by the county treasurer of the county where the person whose es- [fols. 183-187] tate is in question last resided; or, if he was not a resident of the state, of the county where any of his property, real or personal, is situated. A temporary administrator must qualify as prescribed in section one hundred and twenty-one of this act with respect to an administrator-in-chief.

State of New York,
County of New York, ss:

Be It Remembered, That on this 23rd day of July, A. D. 1936, personally came before me, the undersigned, a Notary Public for the State and County aforesaid, A. M. Massie, who being by me duly sworn according to law, did depose and say:

That he is Vice President of The New York Trust Company, a corporation organized under the banking law of the State of New York, which was duly appointed temporary administrator of the estate of Julia M. Hungerford, deceased; that he has read and is familiar with the contents of the foregoing answer; that he was duly authorized to execute the same; that what is contained in said answer so far as it relates to his own act or deed is true, and so far as it relates to the act or deed of any other person, he believes it to be true.

A. M. Massie.

Sworn to and subscribed before me the day and year aforesaid. Montrose Stuart, Notary Public. Notary Public, Queens Co. No. 1616. Register's No. 4926. Certificate filed in N. Y. Co. No. 225. Register's No. 7-S-135. Commission Expires March 30, 1937. (Notarial Seal.)

[fol. 188] In Chancery Court, New Castle County

Petition of Riley, et al., for Leave to Amend Complaint—Filed December 18, 1936

To the Chancellor of the State of Delaware:

The Petition of Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, Deceased, respondents in the above entitled cause, respectfully represents:

(1) At the time of the filing in this cause by these respondents of their pleading in the nature of a Bill of Complaint, certain proceedings, which are referred to in said pleading of these respondents, were pending in the Courts of the State of Georgia. A copy of the record of said proceedings in the Courts of the State of Georgia is attached to said pleading of these respondents.

(2) In numbered paragraph 15 of the Answer to said pleading of these respondents filed by The New York Trust Company, as Temporary Administrator of the Estate of Julia M. Hungerford, Deceased, it is averred, inter alia, that the copy of said record attached to the pleading of these respondents, as aforesaid, is not a complete record and that an appeal was taken from the judgment of the Superior

Court of Fulton County, Georgia, and that said cause was then pending in said Supreme Court on appeal.

(3) At the time said pleading of these respondents was prepared the motion for new trial referred to in said paragraph 15 of the Answer of said The New York Trust Company, Temporary Administrator, had not been determined and a brief of the evidence had not been filed, said brief of evidence having been approved and filed on June 4, 1936, and the motion for new trial having been heard and overruled on June 5, 1936, and the bill of exceptions or writ of [fol. 189] error having been certified on July 1, 1936; whereas said pleading of these respondents was verified on June 3, 1936. Since the last mentioned date the various steps above mentioned have been taken and in addition said appeal or writ of error was heard by the Supreme Court of the State of Georgia and has been decided, and your Petitioners desire, by an amendment to their said pleading filed in this cause, to file copies of all of said proceedings in said Courts of the State of Georgia subsequent to the verification of their said pleading herein.

(4) Subsequent to the filing of your Petitioners' pleading herein, your Petitioners also filed, in the District Court of the United States for the Southern District of Georgia, Savannah Division, a bill in the nature of a bill of interpleader under the Act known as the Federal Interpleader Act approved January 20, 1936; and your Petitioners desire, by an amendment to their pleading herein, to file copies of said last mentioned bill and of all other documents and papers filed in said last mentioned cause.

(5) Your petitioners submit herewith an amendment to their pleading in the nature of a bill of complaint filed in this cause embodying the matters mentioned above.

Wherefore your Petitioners pray that they may be granted leave to file an amendment to their said pleading in the nature of a bill of complaint which is submitted herewith and for such other and further relief as to the Chancellor shall seem proper.

Julian Riley, Hughes Spalding, Executors of Julia M. Hungerford, Deceased. Aaron Finger, Richards, Layton & Finger, Solicitors for Petitioners.

Duly sworn to by Julian Riley and Hughes Spalding. Jurat omitted in printing.

[fol. 190] IN THE CHANCERY COURT, NEW CASTLE COUNTY

AMENDMENT TO COMPLAINT—Filed December 18, 1936

Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, Deceased, by leave of the Chancellor first had and obtained, hereby amend their pleading in the nature of a bill of complaint heretofore [fol. 191] filed by them in this cause by adding to said pleading the following new paragraphs numbered (27), (28), (29), (30), (31), (32), and (33), viz:

(27) After the trial of the cause in the Superior Court of Fulton County, Georgia, on the appeal from the Court of Ordinary of said County, for the probate of the Will of Julia M. Hungerford, and after the verdict had been returned and judgment thereon had been rendered probating said Will in solemn form and finding and adjudicating that the said Julia M. Hungerford at the time of her death was a resident of, and domiciled in, Fulton County, Georgia, all as shown in Exhibit B attached to the original complaint filed by these respondents herein, the said O. Robert Hungerford filed exceptions pendente lite, which were duly certified and made a part of the record in said cause in said Superior Court, and he, the said O. Robert Hungerford, also filed in said Superior Court a motion for new trial. Said motion for new trial was subsequently amended and a brief of the evidence adduced on the trial of said cause in said Superior Court was filed and approved and made a part of the record in said cause in said Superior Court.

(28) After the filing of said motion for new trial, just above referred to, and after the said motion for new trial had been amended and a brief of the evidence had been approved and filed, said motion for new trial, as amended, was overruled and a new trial denied, and an order to this effect was entered by the Superior Court of Fulton County, Georgia, on the 5th day of June, 1936; and thereafter, to-wit, on the 1st day of July, 1936, the said O. Robert Hungerford filed a bill of exceptions for the purpose of carrying said case to the Supreme Court of Georgia, and said bill of exceptions was duly certified.

(29) These respondents attach hereto as a part hereof an exemplified copy of the exceptions pendente lite, the motion for new trial, the amendment to the motion for new trial,

[fol. 192] the brief of the evidence, the order overruling the motion for new trial as amended, and the bill of exceptions herein above referred to, the said exemplified copy being marked Exhibit E.

(30) On November 14, 1936, the Supreme Court of Georgia handed down its decision upon the writ of error sued out by said O. Robert Hungerford, as aforesaid, in which decision the judgment of the Superior Court of Fulton County, Georgia, admitting said Will to probate in solemn form and adjudging that the said Julia M. Hungerford was a resident of and domiciled in Fulton County, Georgia, was affirmed. A true copy of said decision of said Supreme Court of Georgia is hereto annexed marked Exhibit F.

(31) On November 30, 1936, judgment was duly and legally rendered by the Superior Court of Fulton County, Georgia, upon the remittitur from the Supreme Court of Georgia making the decision of said Supreme Court the judgment of said Superior Court. An exemplified copy of said remittitur and of said judgment of said Superior Court is hereto annexed, marked Exhibit G.

(32) The Supreme Court of Georgia is the court of last resort in the State of Georgia and the judgment establishing said will of Julia M. Hungerford in solemn form and that said Julia M. Hungerford was domiciled in Fulton County, Georgia, at the time of her death is now a final judgment.

(33) There is pending in the District Court of the United States for the Southern District of Georgia, Savannah Division, a bill in the nature of interpleader under the act known as the Federal Interpleader Act approved January 20, 1936, said bill having been filed by these respondents, as complainants, against Homer C. Parker, A. L. Crow and G. B. Carriker, of and constituting the State Revenue Commission of Georgia, and Mark Graves, John P. Hennessey and John J. Merrill, of and constituting the State Tax Com- [fol. 193] mission of the State of New York, and Edgar Hirschberg, attorney of the State Tax Commission of the State of New York, as respondents, wherein these respondents, as complainants, are seeking, among other things, a decree requiring the said respondents constituting the State Revenue Commission of Georgia, and the respondents con-

stituting the State Tax Commission of the State of New York, to interplead concerning the estate, succession or inheritance taxes due upon the estate of said Julia M. Hungerford, and to have determined for the purpose of such inheritance or succession taxes the question of the domicile of the said Julia M. Hungerford as between respondents constituting the taxing authorities of the State of Georgia and those constituting the taxing authorities of the State of New York. Upon the filing of said bill, a preliminary injunction was granted restraining and enjoining the said respondents constituting the State Tax Commission of New York from instituting or prosecuting any proceedings looking toward the collection of any succession or inheritance taxes on said estate, and from prosecuting the proceedings instituted by them in the Surrogate's Court of New York County, New York, seeking the probate of the Will of said Julia M. Hungerford, and said injunction is still of full force and effect. These respondents, as the complainants in said last mentioned proceeding, filed bonds in the sum of $55,000.00, with surety, to guarantee payment of any tax claims for which these respondents, as Executors, might be held liable. The hearing in said last mentioned proceedings has been continued and held in abeyance, upon the application of the New York Tax Commission and with the consent of the other parties to said proceeding, because of the pendency of another similar case, the decision in which is expected to be pertinent to the decision in said interpleader suit instituted by these respondents, as aforesaid. A certified copy of said bill of interpleader, a certified copy of said Restraining Order, and a true copy of the entries of service on the re- [fol. 194] spondents named therein, and of the orders passed in said proceedings, and of other papers and documents filed in said proceeding are attached hereto marked Exhibit H.

Julian Riley, Hughes Spalding, Executors of Julia M. Hungerford, Deceased.

Aaron Finger, Richards, Layton & Finger, Solicitors for Executors.

Duly sworn to by Julian Riley and Hughes Spalding. Jurat omitted in printing.

[fol. 195] EXHIBIT E—TO AMENDMENT TO COMPLAINT

COMPLAINANTS' EXHIBIT No. 5

No. 110,062

Fulton Superior Court

HUGHES SPALDING and JULIAN RILEY, Propounders,

vs.

O. ROBERT HUNGERFORD, Caveator

Be it Remembered in the above stated case, that on April 24, 1936, at the March term, 1936, of the above Court, the Court entered an order and decree which is of record herein, wherein, among other things, the Court ordered and adjudged as follows:

"It is further held and adjudged that the said Julia M. Hungerford, at the time of her death, was a resident of and domiciled in Fulton County, Georgia".

To which said order and judgment the caveator then and there excepted and now excepts, and assigns error thereon as follows:

1. As the caveator contends, the said judgment in said respect amounts to a special finding, which cannot be made in an issue formed by a caveat to an application to probate a will.

2. Because as caveator contends said judgment was in effect a declaratory judgment and the courts of this State are without jurisdiction to render declaratory judgments.

3. Because as caveator contends, under the pleadings in said cause the question of the domicile of Mrs. Hungerford was not an issue in the case.

[fol. 196] 4. Because as caveator contends, in his caveat he had denied that the said Mrs. Hungerford was domiciled in Georgia, but had admitted the jurisdiction of the court to determine the factum of the will because he admitted that she had died possessed of real estate in Fulton County, Georgia. This portion of his caveat had been stricken in response to a motion by the propounders setting out, as caveator contends, among other things, that it was insuffi-

cient to constitute an issue in the case. He now excepts to the judgment in this respect, in that he contends the propounders were estopped to ask a finding on said matter, having secured, in the manner aforesaid, action by the caveator striking the same from his caveat.

A motion for a new trial was filed by the caveator and is now pending undisposed of in this cause.

Said caveator, O. Robert Hungerford, prays that this his bill of exceptions pendente lite be certified as true and ordered placed on the record.

This bill of exceptions pendente lite is tendered before the adjournment of the term and within the time allowed by law.

This the 1st day of May, 1936.

(S.) J. Richard Bowden & Harold Hirsch & Marion Smith, Attorneys for O. Robert Hungerford, Caveator.

The foregoing bill of exceptions pendente lite is hereby allowed and certified as true. Let the same, with this certificate, be placed upon the record.

This the 1st day of May, 1936.

(S.) Edgar E. Pomeroy, Judge, S. C. A. C.

[fol. 197] Filed in Office, this the 1st day of May, 1936. Harry Magbee, Deputy Clerk.

No. 110,062

Fulton Superior Court

Hughes Spalding and Julian Riley, Propounders,

vs.

O. Robert Hungerford, Caveator

Motion for New Trial

Now Comes the caveator, O. Robert Hungerford, in the above named and styled case, during the term of Court at which said verdict was rendered, and within thirty (30) days from the time of said trial and the date of said verdict, and being dissatisfied with the verdict and judgment rendered therein, moves the Court to set aside said verdict and judgment and grant a new trial in said case upon the following grounds, to-wit:

1

Because said verdict is contrary to the evidence and is without evidence to support it.

2

Because the verdict is decidedly and strongly against the weight of the evidence.

3

Because said verdict is contrary to law and the principles of justice in equity.

Wherefore, movant prays that the Court grant a rule nisi directed to the propounders herein named, requiring said propounders to show cause why this Motion should not be granted, and a new trial ordered in this case, and the movant [fol. 198] further prays that the Court pass an order allowing movant until the actual hearing of this Motion to prepare and file a complete brief of the evidence in this case, together with a transcript of the Charge of the Court given therein, and prepare and file an amendment to this Motion.

(S.) Marion Smith, by E. D. Smith, Jr., Attorneys for Caveator.

Filed 4/28/1936. Recorded 5/8/1936.

(S.) J. W. Simmons, C. S. C.

No. 110,062

Fulton Superior Court

Hughes Spalding and Julian Riley, Propounders,

vs.

O. Robert Huntzerford, Caveator

Order

The above and foregoing Motion having been presented,

It Is Ordered that the propounders, Hughes Spalding and Julian Riley, and/or their attorneys, be served with a copy of this Motion and this Order, and they and each of them are required to show cause before me on the 4th day of May, 1936, three o'clock P. M., or as soon as said Motion may be reached for hearing, why said Motion should not be granted and a new trial ordered herein.

It Is Further Ordered that Movant shall have until the actual hearing of this Motion for a new trial, whenever it may be, to prepare and present for approval and filing a brief of the evidence in said cause, and Movant shall have [fol. 199] the further right to amend and perfect this Motion for new trial at any time and in any particular at or before the final hearing of same.

This 28th day of April, 1936.

(S.) Edgar E. Pomeroy, Judge, Superior Court, Fulton County.

Certificate of Service

Service of the within Motion and Order is hereby acknowledged, and copy received. This 29th day of April, 1936.

(S.) Colquitt, MacDougald, Troutman, & Arkwright, Jas. A. Branch, Attys. for Propounders.

Filed in Office this the 28th day of April, 1936. (S.) D. W. Brown, Deputy Clerk.

No. 110,062

Fulton Superior Court

Hughes Spalding and Julian Riley, Propounders,

vs.

O. Robert Hungerford, Caveator

Amendment to Motion for New Trial

The caveator comes now and amends his motion for a new trial by adding thereto the following grounds:

4

Movant asserts as a ground why a new trial should be granted to him the action of the Court in directing a verdict [fol. 200] and finding that the said Mrs. Julia M. Hungerford was a resident of and domiciled in Fulton County, Georgia, at the time of her death, which said action of the Court in directing said verdict movant contends was error for which a new trial should be granted. The verdict was

directed by the Court on the motion of the propounders' counsel at the close of the testimony. Movant contends that the action of the Court in directing said verdict was error in the following respects:

(1) It was error, as movant contends, to direct special findings or a special verdict in an issue formed by a caveat to the probate of a will.

(2) The question of the domicile of the deceased was not, as movant contends, an issue under the pleadings in the cause.

(3) A special finding of the said character in this case was, as movant contends, in effect a declaratory judgment, or a finding preliminary to a declaratory judgment, and a declaratory judgment cannot, as movant contends, be rendered in this State.

(4) Movant had stated in his caveat that he denied that the deceased was domiciled in Fulton County, Georgia, but that he admitted the jurisdiction of the court to determine the factum of the will because she died possessed of real estate in Fulton County, Georgia. This averment had been stricken by movant in response to a motion by propounders setting out, among other things, that it was insufficient to constitute an issue in the case. Movant contends that having stricken this statement in his pleadings through his acquiescence in said motion, the propounders were estopped to ask a filing thereon and it was error for the court to direct a finding thereon.

(5) As movant contends, the questions of the domicile of the deceased was not an issue under the evidence in the case in that it appeared without dispute that the deceased owned [fols. 201-224] a large amount of real estate in Fulton County, Georgia, and hence, even though a nonresident, the court would have jurisdiction to determine the factum of the will.

(6) As movant contends, the court had no power to direct a verdict or make judgment determining anything except the factum of the will, and that it be admitted to probate, and that any further verdict or judgment was error.

Wherefore, movant prays that this amendment be allowed and that a new trial be granted him.

(S.) J. Richard Bowden. (S.) Harold Hirsch & Marion Smith, Movant's Attorneys.

Filed 6/4/1936; Recorded 6/5/1936. (S.) J. W. Simmons, C. S. C.

Read and Considered; The recitals of fact in the foregoing amendment to the motion for a new trial are hereby approved as true; the amendment is allowed and ordered filed as a part of the record herein.

This the 4th day of June, 1936.

(S.) Edgar E. Pomeroy, Judge S. C. A. C.

Upon the hearing of the amended motion for a new trial the same is denied & a new trial refused:

This 5th of June, 1936.

(S.) Edgar E. Pomeroy, Judge S. C. A. C.

Filed in Office, this the 4th day of June, 1936. (S.) C. M. Paschal, D. Clerk.

[fol. 225] GEORGIA,
Fulton County:

Be It Remembered, that on the 21st and 22nd days of April, 1936, at the regular March, 1936 term of Fulton Superior Court, before the Honorable Edgar E. Pomeroy, presiding, there came on to be tried the case of In re: Will of Julia M. Hungerford, Hughes Spalding and Julian Riley, Propounders, thereof, and Robert Hungerford, Caveator thereto, the same being an appeal from the Court of Ordinary of said County and being case No. 110062, in Fulton Superior Court.

Be It Remembered, that the said case proceeded regularly to trial on the said 21st and 22nd days of April, 1936. Propounders offered evidence to sustain the factum of the will and also evidence was given from their witnesses on cross-examination that testatrix left valuable real and personal property located in Fulton County, Georgia; and also evidence for the purpose of proving that testatrix was a resident of Fulton County, Georgia; all of which appears more fully from the brief of evidence. Caveator did not offer any evidence but contended throughout the trial that the sole and only issue for determination in such a probate proceeding, was the factum of the will. At the conclusion of the evidence, propounders made a motion for a directed [fol. 226] verdict in favor of the will and also that the jury

be directed to return in its verdict the additional finding that Julia M. Hungerford at the time of her death resided in and was domiciled in Fulton County, Georgia. The Court, over the objection of caveator, granted this motion and directed the jury to return the verdict asked for by propounders, which verdict was returned to the jury on April 22, 1936. Caveator urged objection to the additional special finding as to domicile, which he contended was going outside the issues in such a probate proceeding, and because the undisputed evidence of propounders themselves having established that testatrix owned many parcels of real estate in Fulton County, Georgia, and at the time of her death, and the factum of the will having been proven, the Court was without authority to deny probate, regardless of the residence of testatrix, and accordingly directing the jury to bring in said additional finding as to the domicile of testatrix constituted a declaratory judgment, for which there is no provision under the law of Georgia. After said directed verdict was returned by the jury, the Court entered up judgment thereon, and in accordance therewith, on April 24th, 1936.

To which judgment of the Court which purported to adjudge that Julia M. Hungerford at the time of her death was a resident of and domiciled in Fulton County, Georgia, the caveator then and there objected and excepted and assigned and now assigns the same as error in law and duly filed his exceptions pendente lite thereto, which were allowed and certified as true and ordered filed as a part of the record by the presiding Judge, Honorable Edgar E. Pomeroy on May 1, 1936. And caveator now excepts and assigns error on the ruling and judgment of the court as aforesaid and on the exceptions pendente lite as aforesaid upon the ground that the judgment was contrary to law on each and every ground set forth in said exceptions pendente lite and [fol. 227] now set forth in this bill of exceptions, to-wit:

(1) As the caveator contends, the said judgment in said respect amounts to a special finding, which cannot be made in an issue formed by a caveat to an application to probate a will.

2. Because as caveator contends said judgment was in effect a declaratory judgment and the courts of this State are without jurisdiction to render declaratory judgments.

(3) Because as caveator contends, under the pleadings in said cause the question of the domicile of Mrs. Hungerford was not an issue in the case.

(4) Because as caveator contends, in his caveat he denied that the said Mrs. Hungerford was domiciled in Georgia, but admitted that the Court had jurisdiction to determine the factum of the will because he admitted that she had died possessed of real estate in Fulton County, Georgia. This portion of his caveat had been stricken in response to a motion by the propounders setting out, as caveator contends, among other things, that it was insufficient to constitute an issue in the case. He now excepts to that judgment in this respect, in that he contends the propounders were estopped to ask a finding on said matter, having secured, in the manner aforesaid, action by the caveator striking the same from his caveat.

Be It Further Remembered that, within the time prescribed by law, and at the same term of said Court, on April 28, 1936, caveator duly filed his motion for new trial in said case, and on June 4, 1936, duly filed an amendment thereto, together with a brief of the evidence which was duly approved and certified as true by said judge, as were also the recitals of facts in the several grounds of the motion for new trial as amended. Said amended motion for new trial [fol. 228] came up duly and regularly to be heard on the date set therefor by said Judge, to-wit; on the 5th day of June, 1936, at the May 1936 Term of said Court, and upon the hearing thereof the same was denied and a new trial refused by the Court.

Caveator contends that this case was thus illegally terminated. And to said judgment of the Court denying and refusing the said amended motion for new trial caveator then and there excepted and now excepts, and assigns error thereon as being contrary to law, and says that the Court erred in overruling said motion for new trial as amended and on each and all of the grounds therein stated, and caveator says that said Judge should have granted said motion upon each and all of the grounds therein taken and set out.

Robt. Hungerford, Caveator, names himself herein as plaintiff in error, and he names Hughes Spalding and Julian Riley, executors and propounders of the will of Julia M. Hungerford, as defendants in error, in this bill of exceptions.

Plaintiff in error comes on this the 30 day of June, 1936,

and within the time prescribed by law and before the adjournment of said May term of said court, and presents to the Honorable Edgar E. Pomeroy, Judge of said court, who presided in said case, this his bill of exceptions, and asks that the same be signed and certified in order that the said case may be carried to the Supreme Court of Georgia, so that the errors herein alleged to have been committed may be considered and corrected.

Plaintiff in error specifies as material to a clear understanding of the errors complained of, the following portions of the record, to-wit:

First. The original application of Hughes Spalding and Julian Riley, filed in the Court of Ordinary of Fulton County, Georgia, December 2nd, 1935, for the probate of the will of Julia M. Hungerford in solemn form, together [fol. 229] with the citations and the entries of service thereof.

Second. The Caveat of Robert Hungerford, filed in the Court of Ordinary of Fulton County, Georgia, on January 23, 1936.

Third. The appeal to the Fulton Superior Court, and bond, and order, and certificate approving and entering same, filed in the Court of Ordinary of Fulton County and signed by Judge Thomas H. Jeffries, Ordinary, on January 8th, 1936.

Fourth. The demurrer and motion to strike filed by Hughes Spalding and Julian Riley, executors and propounders, on April 7th, 1936, together with order of Court and acknowledgment of service thereon:

Fifth. The reply to the motion to strike, filed by Robert Hungerford, Caveator, on April 13th, 1936.

Sixth. The amendment of Robert Hungerford, Caveator, striking the last paragraph of his caveat, and the order of Judge Hugh M. Dorsey, presiding over the Motion Division of the Fulton Superior Court, allowing the same, dated April 13th, 1936.

Seventh. The verdict of the jury in the Fulton Superior Court, finding in favor of the will, dated April 22nd, 1936.

Eighth. The judgment of the Fulton Superior Court, Honorable Edgar E. Pomeroy presiding, dated April 24th,

1936, ordering the will of Julia M. Hungerford admitted to record, as proven in solemn form.

Ninth. Exceptions pendente lite filed by Robert Hungerford, Caveator, and allowed and certified as true, and ordered filed by Honorable Edgar E. Pomeroy, trial judge, on May 1st, 1936.

Tenth. Motion for new trial filed by Robert Hungerford, Caveator, on April 28th, 1936, together with order of trial [fol. 230] judge thereon, together with acknowledgment of service thereon by attorneys for propounders.

Eleventh. Amended motion for new trial filed by Robert Hungerford, caveator, June 4, 1936, together with certificate of Honorable Edgar E. Pomeroy, trial Judge, approving the same.

Twelfth. The brief of evidence and order approving same dated 4 day of June, 1936.

Thirteenth. Order of the trial Judge, Honorable Edgar E. Pomeroy, overruling and denying motion for new trial, dated June 5, 1936.

The Supreme Court of Georgia, rather than the Court of Appeals of Georgia, has jurisdiction of this case because it is a case which involves the validity of a will.

(S.) Harold Hirsch & Marion Smith, J. Richard Bowden, Attorneys for Robert Hungerford, Plaintiff in Error.

P. O. Address: Atlanta, Georgia.

[fol. 231] I do certify that the foregoing bill of exceptions is true and contains all of the evidence and specifies all of the record material to a clear understanding of the errors complained of, and the Clerk of the Superior Court of Fulton County, Georgia, is hereby directed to make out a complete copy of such portions of the record as are in this bill of exceptions specified, and certify them as such, and cause them to be transmitted to the Supreme Court of Georgia, in order that the errors alleged to have been committed may be considered and corrected.

This 1st day of July, 1936.

(S.) Edgar E. Pomeroy, Judge, Superior Court, Fulton County.

* * * * * * *

ACKNOWLEDGMENT OF SERVICE

Due and legal service is hereby acknowledged on the within and foregoing bill of exceptions, copy and all other and further service and notice is hereby waived.

This 1st day of July, 1936.

(S.) Colquitt, MacDougald, Troutman & Arkwright,
J. A. Branch, Attorneys for Defendants in Error.

Filed in Office, this the 1 day of July 1936. (S.) Lee Earl Largen, Deputy Clerk.

[fol. 232] (Seal of State) GEORGIA,
Fulton County, ss:

I, J. W. Simmons, Clerk of the Superior Court of Fulton County, do hereby certify that I have compared the foregoing copy of Bill of Exceptions pendente lite and Order of Court allowing same, filed in this office May 1, 1936, Motion for new trial and order of Court thereon, filed in this office April 28, 1936, Amendment to Motion for new trial and Orders of Court thereon, same filed in office June 4, 1936, Brief of the evidence and Order of Court thereon, filed in office June 4, 1936, Bill of Exceptions & certificate thereon filed in office the 1 day of July, 1936 in case: Hughes Spalding and Julian Riley as Executors and Propounders of the will of Julia M. Hungerford vs. O. Robert Hungerford, Caveator, No. 110062, Superior Court of Fulton County, Ga., Same having been appealed from the Court of Ordinary of Fulton County, Ga. (Seal.)

with the original record thereof, now remaining in this office, and the same is a correct transcript therefrom, and of the whole of such original record, and that said Court is a Court of Record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this the 12 day of Nov. 1936.

J. W. Simmons, Clerk Superior Court of Fulton County, Georgia.

GEORGIA,
Fulton County, ss:

(State Seal)

I, Virlyn B. Moore, do certify that I am Judge of the Superior Court of Fulton County, Georgia, and that I am

the presiding Judge of said Court, and that the above at-
[fol. 233] testation, subscribed by J. W. Simmons as Clerk of said Court, is sufficient and in due form of law, and that his signature thereto is genuine.

Witness my hand and official signature, this the 12 day of Nov. 1936.

Virlyn B. Moore, Judge Superior Court, Fulton, Georgia.

GEORGIA,
Fulton County, ss:

(State Seal)

I, J. W. Simmons, Clerk of the Superior Court in and for said County, hereby certify that the above attestation of Hon. Virlyn B. Moore, Judge of the Superior Court of Fulton County, Georgia, is his genuine signature, and that he is Judge of said Court, and said certificate is in due form of law:

Given under my hand and seal of office this the 12 day of Nov. 1936.

J. W. Simmons, Clerk Superior Court of Fulton County, Georgia.

[fol. 234] EXHIBIT F TO AMENDMENT TO COMPLAINT

Complainant's Exhibit No. 6

SUPREME COURT OF GEORGIA

No. 11518

Decided November 14, 1936

HUNGERFORD

v.

SPALDING et al., Extrs.

By the COURT:

It appearing from the record that the will was offered for probate in the court of ordinary of Fulton County, as the court having jurisdiction, solely upon the ground that the decedent was domiciled in that county at the time of

her death, and there being no contention that the evidence did not establish without dispute all averments contained in the application for probate, it is not cause for reversal, for any reason assigned, that the Court in directing the verdict in favor of probate included direction for a special finding that the decedent was a resident of and was domiciled in Fulton County at the time of her death. A general verdict for the propounders would necessarily have implied the jurisdictional fact that the decedent was so domiciled; and it does not appear that the caveator was harmed by the direction of such special finding, or by its existence as a part of the verdict.

An application for probate of a will was filed in the court of ordinary of Fulton County alleging that the propounders were the nominated executors, and that they resided in Fulton County. The application also alleged that the testatrix died a resident of that county "owning valuable real and personal estate in said State." An heir at law filed a caveat which alleged, among other things, that the decedent "was domiciled in the State of New York at the time of her death" and was only temporarily visiting in Fulton County, but that "this recital is made • • • merely as a matter of record since the caveator acknowledges that there is real estate of the decedent located in [fol. 235] Fulton County, Georgia, and hence the legal domicile of the decedent is not an issuable matter on a proceeding the sole purpose of which is to admit to record in solemn form an alleged will." After probate in the court of ordinary, the caveator appealed to the superior court where the propounders demurred to the portion of the caveat relating to domicil on the grounds, among others, "that it does not purport to offer or advance any issuable fact, or ground, or reason for refusing the probate of said will, and that "said matter should not be allowed to be incorporated in the record unless the caveator offers the same as an issuable matter." In response to this demurrer the caveator amended by striking the allegations with reference to domicile, averring, however, that he did not admit thereby "that the decedent was domiciled in the State of Georgia," but admitted "only that the court would in any event have said jurisdiction because of said real estate" situated in Fulton County. The case proceeded to trial in the superior court where the propounders offered evidence in support of the application for probate, includ-

ing evidence that the decedent was domiciled in Fulton County at the time of her death. There being no evidence to the contrary, the court directed a verdict in favor of the propounders and against the caveat, and, specially, that the testatrix, "at the time of her death, resided in and was domiciled in Fulton County, Georgia." The caveator excepted pendente lite to the direction of the verdict so far as it referred to residence and domicile, and also moved for a new trial in which, as amended, such direction was assigned as error consistently with the exceptions pendente lite, upon the following grounds:

(1) That "it was error, as movant contends, to direct special findings or a special verdict in an issue formed by a caveat to the probate of a will.

"(2) The question of the domicile of the deceased was not, as movant contends, an issue under the pleadings in the cause.

[fol. 236] "(3) A special finding of the said character in this case was, as movant contends, in effect a declaratory judgment, or a finding preliminary to a declaratory judgment, and a declaratory judgment cannot, as movant contends, be rendered in this State.

"(4) Movant had stated in his caveat that he denied that the deceased was domiciled in Fulton County, Georgia, but that he admitted the jurisdiction of the court to determine the factum of the will because she died possessed of real estate in Fulton County, Georgia. This averment had been stricken by movant in response to a motion by propounders setting out, among other things, that it was insufficient to constitute an issue in the case. Movant contends that having stricken this statement in his pleadings through his acquiescence in said motion, the propounders were estopped to ask a finding thereon and it was error for the court to direct a finding thereon.

"(5) As movant contends, the question of the domicile of the deceased was not an issue under the evidence in the case in that it appeared without dispute that the deceased owned a large amount of real estate in Fulton County, Georgia, and hence, even though a non-resident, the court would have jurisdiction to determine the factum of the will.

"(6) As movant contends, the court had no power to direct a verdict or make a judgment determining anything except the factum of the will, and that it be admitted to probate, and that any further verdict or judgment was error."

The motion for a new trial was overruled and the caveator excepted, assigning error upon the overruling of the motion and the exceptions pendente lite.

PER CURIAM:

The petition for the probate of the will did not allege that the decedent owned real estate in Fulton County. It merely alleged that she owned real estate and personal property in the State of Georgia. However, the mere [fol. 237] ownership of real estate in Fulton County would not confer jurisdiction upon the court of ordinary of such county to probate the alleged will unless the decedent died a non-resident of the State of Georgia, since the probate of a will must be made in the county of the residence of the alleged testator if a resident of this State; and, if not a resident of this State, the will may be probated in any county where real estate belonging to the testator is situated. Code, Sec. 113-603, 113-702.

The application alleged that the testatrix resided in Fulton County, and, under this and the other allegations made, must be construed as an application to probate the will generally as a will of a person domiciled in that county. It was thus necessary in order to admit the will to probate to show that the decedent was domiciled in Fulton County at the time of her death; otherwise the court of ordinary would not have had jurisdiction.

Every court must determine its jurisdiction before proceeding with any cause presented to it and this rule applies in full measure to an application to probate a will, notwithstanding aside from jurisdiction the only question for determination in such case is devisavit vel non.

The court in this case not only directed a verdict in favor of the probate but specially directed a finding that the decedent was a resident of and domiciled in the county of Fulton at the time of her death. This special finding would necessarily have been implied in a general verdict in favor of the propounders because it was necessary to determine the matter of jurisdiction as a condition precedent to a

judgment probating the will. It follows that the caveator was not harmed by the existence of such finding as a part of the verdict, and the direction of such verdict is not cause for reversal for any reason assigned.

[fol. 238] In support of the foregoing opinion, see: Arnold v. Arnold, 62 Ga. 627; Tant v. Wigfall, 65 Ga. 412; Milner v. Neel, 114 Ga. 118, 121; Jones v. Smith, 120 Ga. 642 (1); Godwin v. Godwin, 129 Ga. 67, 68; University of Georgia v. Denmark, 141 Ga. 390; Worsham v. Ligon, 144 Ga. 707; Wash. v. Dickson, 147 Ga. 540. The conclusion reached is not contrary to the rulings made in Wetter v. Habersham, 60 Ga. 193 (10); Underwood v. Thurmond, 111 Ga. 325; Peavy v. Crawford, 182 Ga. 782 (187 S. E. 13).

Judgment affirmed. All the Justices concur, except Russell, C. J., who dissents.

RUSSELL, Chief Justice, dissenting:

Under the provisions of section 24-3901 of the Code of 1933 the Supreme Court should in my opinion made a final disposition of this cause. The will of the testatrix has been proved in solemn form in the court of ordinary of Fulton County, but was taken by appeal to the superior court. In the superior court the judge directed the jury to find in favor of the propounders and against the caveat, and that the will propounded is the last will and testament of Mrs. Julia M. Hungerford, and in addition thereto the court directed the jury to find that the testatrix at the time of her death resided in and was domiciled in Fulton County, Georgia. The question whether the testatrix was a resident of or domiciled in Fulton County was wholly irrelevant upon the only question which could have been submitted upon the probate of a will, viz., the factum of the will—devisavit vel non. Peavy v. Crawford, — Ga. — (183 S. E. 13) and citations. The words "residence" and "domicile" are not synonymous. Worsham v. Ligon, 144 Ga. 705, 711. The respective rights of the parties interested in the estate of a decedent, whether fixed by residence or domicile, are not pertinent when the only real question to which the probate court was confined was the factum of the will sought to be propounded. In such an appeal, the powers of the superior court are not greater than those of the court of ordinary. [fol. 239] The court of ordinary had assumed the jurisdiction with which it is clothed by law, and that jurisdiction

was uncontested. Whether the rights of any person interested in the subject-matter depended upon residence or domicile—or such rights might inhere in different persons or both confined in one individual—was not a matter germane to the probate of the will.

According to my view this court should order that upon the return of the remittitur in this cause, the judge of the superior court of Fulton County strike from the verdict directed by him, and from the decree issued by him in pursuance thereof, all references to the residence or domicile of the testatrix.

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EXHIBIT "G" TO AMENDMENT TO COMPLAINT

Complainants Exhibit No. 7

Supreme Court of Georgia. Atlanta November 14, 1936.

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered.

ROBERT HUNGERFORD

v.

HUGHES SPALDING, et al., exrs.

This case came before this court upon a writ of error from the superior court of Fulton County; and after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

All the Justices concur, except Russell, C. J., who dissents.

Upon considering the within Remitter, it is ordered and adjudged that the decision of the Supreme Court be made the judgment of this Court, and that the same be entered upon the minutes.

It is Further Ordered and Adjudged, That Hughes Spalding, et al. exrs. for use of Officers of Court recover of Robert Hungerford $— cost of making up the record in

this case and the amount of cost paid in the Supreme Court on the same.

[fol. 240] In open Court, this the 30 day of Nov. 1936.

Edgar E. Pomeroy, Judge Sc Court of AC. Minutes 167 page 465.

Bill of Costs, $15.00.

Supreme Court of the State of Georgia. Clerk's Office, Atlanta Nov. 25, 1936.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that J. Richard Bowden paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

K. C. Bleckley, Clerk. (Seal of Supreme Court.)

Filed in office this the 27 day of Nov. 1936

D. W. Brown, Deputy Clerk.

(State Seal.)

GEORGIA,

Fulton County, ss:

I, J. W. Simmons, Clerk of the Superior Court of Fulton County, do hereby certify that I have compared the foregoing copy of Remitter and Judgment of the Superior Court thereon, making same the Judgment of the Superior Court in case: Robert Hungerford, Plaintiff in error vs. Hughes Spalding, et al., extrs No. 110,062, Fulton Superior Court, with the original record thereof, now remaining in this office, and the same is a correct transcript therefrom, and of the whole of such original record, and that said Court is a Court of Record.

[fols. 241-318] In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this the 4 day of December 1936.

J. W. Simmons, Clerk, Superior Court of Fulton County, Georgia. (Seal.)

GEORGIA,

Fulton County, ss:

(Seal.)

I, Virlyn B. Moore, do certify that I am Judge of the Superior Court of Fulton County, Georgia, and that I am

the presiding Judge of said Court, and that the above attestation, subscribed by J. W. Simmons as Clerk of said Court, is sufficient and in due form of law, and that his signature thereto is genuine.

Witness my hand and official signature, this the 4 day of December 1936.

Virlyn B. Moore, Judge Superior Court, Fulton County, Georgia.

GEORGIA,
Fulton County, ss:

(Seal.)

I, J. W. Simmons, Clerk of the Superior Court in and for said County, hereby certify that the above attestation of Hon. Virlyn B. Moore, Judge of the Superior Court of Fulton County, Georgia, is his genuine signature, and that he is Judge of said Court, and said certificate is in due form of law.

Given under my hand and seal of office this the 4 day of Dec. 1936.

J. W. Simmons, Clerk Superior Court of Fulton County, Georgia.

[fol. 319] IN THE CHANCERY COURT, NEW CASTLE COUNTY

AMENDMENT TO ANSWER—Filed January 27, 1937

Amendment to Pleading in the Nature of an Answer of the New York Trust Company, a Corporation of the State of New York, Temporary Administrator of the Estate of Julia M. Hungerford, Deceased.

To the Chancellor of the State of Delaware:

The New York Trust Company, a corporation of the State of New York, temporary administrator as aforesaid, by leave of the Chancellor first had and obtained, hereby amends its pleading in the nature of an answer heretofore filed by it in this cause by adding to Exhibit "D" to said pleading a copy of Section 127 of the Surrogate's Court Act of the State of New York, copy of which said Section 137 is hereto annexed, marked "Supplement to Exhibit D

to Answer", and which said Section 127 this respondent avers is now in full force and effect, and was in full force and effect at all times since the death of the said Julia M. Hungerford.

The New York Trust Company, by H. W. Morse, Vice-President.

Attest: J. M. Connor, Assistant Trust Officer.

D. O. Hastings, C. A. Southerland, Solicitors for the New York Trust Company, temporary administrator of the estate of Julia M. Hungerford.

[fol. 320] *Duly sworn to by H. W. Morse. Jurat omitted in printing.*

[fol. 321] SUPPLEMENT TO EXHIBIT D TO ANSWER

(Defendants Exhibit No. 18-A)

Estate of Julia M. Hungerford

Section 127 of Surrogate's Court Act

"Sec. 127. General powers of temporary administrator.

A temporary administrator, appointed as prescribed in this article, has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and, for either of these purposes, or for the purpose of determining the title to personal property in his possession, he may maintain any action or special proceeding. An action may be maintained against him, by leave of the surrogate, upon a debt of the decedent, or of the absentee whom he represents, or upon any cause of action to which the decedent or absentee would have been a party in like manner and with like effect as if he were an administrator-in-chief. The surrogate may, by an order made upon at least ten days' notice to all the parties who have appeared in the special proceeding, authorize the temporary administrator to sell, after appraisal, such personal property, specifying it, of the decedent, or of the absentee whom he represents, as it appears to be necessary to sell, for the benefit of the estate; or, if it appears that the safety of the estate requires the notice to be shortened, the surro-

gate may shorten the notice to not less than two days. The surrogate may, also, by order, authorize him to pay funeral expenses, or any expenses of the administration of his trust, or stenographer's or referee's fees on contest of a will or administration; and he may also direct the payment of a legacy or other pecuniary provision under a will or a distributive share or just proportionate part thereof, accord-
[fol. 322] ing to sections two hundred and seventeen, two hundred and eighteen of this act as though he were an executor or administrator."

IN THE CHANCERY COURT, NEW CASTLE COUNTY

ORDER GRANTING LEAVE TO AMEND ANSWER—January 27, 1937

Upon which foregoing amendment, the following order was made:

And now, to-wit, this 27th day of January, A. D. 1937, upon motion of Clarence A. Southerland, Esq., and Daniel O. Hastings, Esq., solicitors for The New York Trust Company, temporary administrator of the estate of Julia M. Hungerford, deceased, Aaron Finger, Esq., solicitor for Julian Riley and Hughes Spalding, as executors of the estate of Julia M. Hungerford, deceased, not objecting thereto, it is

Ordered by the Chancellor that the said The New York Trust Company, as temporary administrator as aforesaid, be and it is hereby granted leave to file the annexed amendment to its pleading in the nature of an answer heretofore filed in the above entitled cause.

J. O. Wolcott, Chancellor.

[fol. 323] IN THE CHANCERY COURT, NEW CASTLE COUNTY

ANSWER TO AMENDMENT TO COMPLAINT—Filed February 5, 1937

New York Trust Company, a corporation of the State of New York, as Temporary Administrator of the Estate of Julia M. Hungerford, deceased, for answer to the amendment to the bill of complaint filed in the above entitled cause, avers as follows;

1. This respondent admits that the exhibits attached to said amendment, being Exhibit E, Exhibit F, and Exhibit G, are true and correct copies of proceedings referred to in Paragraphs 27 to 31 inclusive of said amendment; but for the tenor and effect of the documents and proceedings therein set forth and referred to this respondent craves leave to refer to the exemplified copies thereof when produced at the trial.

2. This respondent admits that the Supreme Court of Georgia is the court of last resort in the State of Georgia. For answer to the remaining allegations of Paragraph 32, this respondent refers to the documents set forth in said Exhibits E, F and G for the legal effect thereof.

3. This respondent avers that the allegations contained in Paragraph 32 of said amendment to the bill of complaint are irrelevant and immaterial to any issue in this case, and declines to make answer to the same.

The New York Trust Company, by H. W. Morse, Vice-President, Temporary Administrator of the Estate of Julia M. Hungerford, Deceased. (Corporate Seal.)

Attest: M. Stuart, Asst. Secretary.

C. A. Southerland, Solicitor for Respondent.

[fol. 324] *Duly sworn to by H. W. Morse. Jurat omitted in printing.*

IN THE CHANCERY COURT, NEW CASTLE COUNTY

MOTION FOR DECREE NOTWITHSTANDING ANSWER—Filed February 13, 1937

Now Come into Court Julian Riley and Hughes Spalding, Executors of the estate of Julia M. Hungerford, Deceased, Respondents in the above entitled cause, and, upon their pleading in the nature of a Bill of Complaint, as amended, heretofore filed by them in this cause, move for a decree against The New York Trust Company, a corporation of the State of New York, as Temporary Administrator of the Estate of Julia M. Hungerford, Deceased, Respondent in this cause, notwithstanding the pleading in the nature of

[fol. 325] an answer, as amended, filed by it in this cause.

Aaron Finger, Solicitor for Julian Riley and Hughes Spalding, Executors of Julia M. Hungerford, Deceased.

Duly sworn to by Aaron Finger. Jurat omitted in printing.

IN THE CHANCERY COURT, NEW CASTLE COUNTY

ORDER SETTING MOTION FOR HEARING—February 24, 1937

On This 24th day of February, A. D. 1937, upon motion of Aaron Finger, one of the Solicitors for Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, Deceased, Clarence A. Southerland, Esquire, one of the Solicitors for The New York Trust Company, Temporary Administrator of Julia M. Hungerford, Deceased, consenting.

It is Ordered that the motion of Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, [fol. 326] Deceased, for a decree against The New York Trust Company, as Temporary Administrator of Julia M. Hungerford, Deceased, notwithstanding the pleading in the nature of an answer, as amended, filed by said last mentioned Respondent, be, and the same hereby is, set down for hearing before the Chancellor on March 24th, 1937, at 10:30 A. M.

J. O. Wolcott, Chancellor.

IN THE CHANCERY COURT, NEW CASTLE COUNTY

MOTION FOR LEAVE TO AMEND ANSWER—Filed March 10, 1937

The New York Trust Company, a corporation of the State of New York, as temporary administrator of the estate of Julia M. Hungerford, deceased, by Clarence A. Southerland, its solicitor, now moves for leave to amend the pleading in the nature of an answer heretofore filed by it in the above entitled cause, a copy of the proposed amendment being hereto annexed.

C. A. Southerland, Solicitor for The New York Trust Company, Temporary Administrator of the Estate of Julia M. Hungerford, Deceased.

IN THE CHANCERY COURT, NEW CASTLE COUNTY

ORDER GRANTING LEAVE TO AMEND ANSWER—March 10, 1937

Upon which motion the following order was entered:

And now, to-wit, this 10th day of March, A. D. 1937, upon motion of Clarence A. Southerland, Esq., solicitor for The New York Trust Company, as temporary administrator of the estate of Julia M. Hungerford, deceased, Aaron Finger, Esq., solicitor for Julian Riley and Hughes Spalding, as executors of the estate of Julia M. Hungerford, deceased, not objecting thereto, it is

Ordered by the Chancellor that the said The New York [fol. 327] Trust Company, temporary administrator as aforesaid, be and it is hereby granted leave to file the amendment to its pleading in the nature of an answer, which said amendment is hereto annexed.

J. O. Wolcott, Chancellor.

To which motion and order the following amendment was attached:

IN THE CHANCERY COURT, NEW CASTLE COUNTY

AMENDMENT TO ANSWER—Filed March 10, 1937

Amendment to pleading in the nature of an answer of the New York Trust Company, a corporation of the State of New York, temporary administrator of the estate of Julia M. Hungerford, deceased.

To the Chancellor of the State of Delaware:

The New York Trust Company, temporary administrator of the estate of Julia M. Hungerford, deceased, by leave of the Chancellor first had and obtained, hereby amends its pleading in the nature of an answer heretofore filed by it in this cause by striking out paragraph 6 of said pleading and inserting in lieu thereof the following:

"For answer to paragraph 6 of said bill of complaint this respondent admits that under the law of the State of Georgia the persons named in paragraph 5 of said bill of complaint were the only parties entitled to be heard on the question of the probate of said will; but this respondent avers that they were not the only parties interested in the estate

of the decedent, and further avers that all creditors of the decedent, some of whom are residents of the State of New York, were interested in said estate, and further avers that [fol.328] the State of New York, under and pursuant to certain statutes of that State, relating to inheritance and estate taxes, has certain claims for inheritance and estate taxes against said estate, and that the State of New York, acting through the agency of the State Tax Commission of the State of New York, is asserting such claims for inheritance and estate taxes in a substantial amount, and has taken steps to bring about the probate of the last will and testament of the said Julia M. Hungerford in the State of New York, as hereinafter set forth. This respondent further avers that the claim of the State of New York for such inheritance and estate taxes is based wholly upon the fact that the said Julia M. Hungerford died a resident of the State of New York. A copy of certain sections of the laws of the State of New York relating to inheritance and estate taxes imposed on the estate of any decedent who was at the time of his or her death a resident of the State of New York is hereto attached, marked Exhibit "E", and made a part of this answer; and this respondent avers that said statutes were at the time of the death of the said Julia M. Hungerford and still are in full force and effect. This respondent further avers that the claims for inheritance and estate taxes so asserted by the State of New York as aforesaid relate to taxes assessable under said statutes of the State of New York."

The New York Trust Company By H. W. Morse, Vice-President. Attest: J. W. Connor, Assistant Trust Officer. (Corporate Seal.)

C. A. Southerland, Solicitor for The New York Trust Company, temporary administrator of the estate of Julia M. Hungerford, deceased.

[fol. 329] *Duly sworn to by H. W. Morse. Jurat omitted in printing.*

[fol. 330] EXHIBIT E TO AMENDMENT TO ANSWER

Laws of New York—1930—Chapter 710

"Section 249-n. *Tax on estates of resident decedents.*

1. A tax equal to the sum of the following percentages of

the value of the net estate is hereby imposed upon the transfer of the net estate of every person dying on or after the effective date of this article who, at the time of death was a resident of this state, but net estates of less than five thousand dollars shall not be taxable:

"Four-fifths of one per centum of the amount of the net estate not in excess of one hundred and fifty thousand dollars, except so much thereof as may be exempted from tax under the provisions of section two hundred and forty-nine hereof;

"One and three-fifths per centum of the amount by which the net estate exceeds one hundred and fifty thousand dollars and does not exceed two hundred thousand dollars;

"Two and two-fifths per centum of the amount by which the net estate exceeds two hundred thousand dollars and does not exceed three hundred thousand dollars;

"Three and one-fifth per centum of the amount by which the net estate exceeds three hundred thousand dollars and does not exceed five hundred thousand dollars;

"Four per centum of the amount by which the net estate exceeds five hundred thousand dollars and does not exceed seven hundred thousand dollars;

[fol. 331] "Four and four-fifths per centum of the amount by which the net estate exceeds seven hundred thousand dollars and does not exceed nine hundred thousand dollars;

"Five and three-fifths per centum of the amount by which the net estate exceeds nine hundred thousand dollars and does not exceed one million one hundred thousand dollars;

"Six and two-fifths per centum of the amount by which the net estate exceeds one million one hundred thousand dollars and does not exceed one million six hundred thousand dollars;

"Seven and one-fifth per centum of the amount by which the net estate exceeds one million six hundred thousand dollars and does not exceed two million one hundred thousand dollars;" * * *

Laws of New York—1930—Chapter 710

"Section 249-z. *When tax due; discount and interest.* 1. The tax imposed by this article shall be due and payable at the time of the decedent's death and shall be paid by the executor, subject to being by him charged against and collected from the persons interested in the estate, to the tax commission in a county in which the office of appraiser is

salaried, and in other counties, to the county treasurer, and said tax commission or county treasurer shall furnish duplicate receipts therefor. If the tax has not been assessed, a temporary payment may be made by the executor for the purpose of obtaining the discount herein provided for or of avoiding interest." * * *

[fol. 332] IN THE CHANCERY COURT, NEW CASTLE COUNTY

STIPULATION OF COUNSEL AS TO POSSESSION OF STOCK CERTIFICATES—Filed May 18, 1938

It Is Hereby Stipulated and Agreed by and between the Solicitors for the respective parties that, for the purpose of the pending Motion for a decree notwithstanding answer, it is admitted by The New York Trust Company, as Temporary Administrator of Julia M. Hungerford, deceased:

(1) That the stock certificates unindorsed by decedent evidencing the shares of stock in controversy are in the possession of Julian Riley and Hughes Spalding, as Executors of Julia M. Hungerford, Deceased;

(2) That the documents referred to in numbered paragraph 33 of the Amendment to the Executors' bill of complaint are true copies of documents filed as set forth in said numbered paragraph 33 of said Amendment.

C. A. Southerland, Solicitor for The New York Trust Company, as Temporary Administrator of Julia M. Hungerford, Deceased. Aaron Finger, Solicitor for Julian Riley and Hughes Spalding, as Executors of Julia M. Hungerford, Deceased.

April 11, 1937.

IN THE CHANCERY COURT, NEW CASTLE COUNTY

STIPULATION REGARDING LETTERS TO BE PART OF RECORD—Filed May 18, 1938

And Now, to-wit, this Eleventh day of December, A. D. 1937, it is Stipulated and Agreed by and between Aaron Finger, Esq., solicitor for Julian Riley and Hughes [fol. 333] Spalding, as Executors of the Estate of Julia M.

Hungerford, Deceased, and Clarence A. Southerland, Esq., Solicitor for The New York Trust Company, as Temporary Administrator of the Estate of Julia M. Hungerford, Deceased, that the facts set forth in the copies of the letters attached hereto may be submitted to and considered by the Chancellor in connection with the pending motion for decree notwithstanding answer, with like effect as though such facts had been incorporated in the pleadings.

Aaron Finger, Solicitor for Julian Riley and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, Deceased. C. A. Southerland, Solicitor for The New York Trust Company, as Temporary Administrator of the Estate of Julia M. Hungerford, Deceased. Ward & Gray, Delaware Trust Building, Wilmington, Delaware.

December 6, 1937.

Re: Estate of Julia M. Hungerford

Aaron Finger, Esq., Du Pont Building, Wilmington, Delaware.

My dear Aaron:

I am advised that sometime prior to February 26, 1937, your clients, Messrs. Riley and Spalding as executors of Mrs. Hungerford's Estate, paid to the Tax Commission of the State of Georgia the inheritance tax claim of the State of Georgia due it from Mrs. Hungerford's Estate.

This facts seems to me to be pertinent in connection with the argument found in your original brief on page 29 and [fol. 334] page 46, and further put forward in your reply brief on pages 26 and 27, relating to the effect of the interpleader suit filed by the Georgia executors in the United States District Court in Georgia.

If your understanding of the facts is the same as mine, will you please advise me and sign the attached stipulation?

Yours very truly, (S.) C. A. Southerland, O.

CAS: H.

Copy

Richards, Layton & Finger
4072 Du Pont Building
Wilmington, Delaware

December 11, 1937.

Re Estate of Julia M. Hungerford, Deceased

Clarence A. Southerland, Esquire., Delaware Trust Building, Wilmington, Delaware.

Dear Clarence:

In reply to your letter of December 6th, I am informed that what you say is correct. As a matter of fact, the payment was made by mistake by an associate of one of the Executors who is looking after that phase of the administration of the estate. However, in view of the decision of the United States Supreme Court, handed down a few days ago, in the case of Worcester County Trust Company, Executor, v. Ray L. Riley, Controller, etc. et al., I believe that it is proper for the Chancellor to ignore that portion of the argument in our briefs which is based upon the interpleader suit in the Federal Court in Georgia.

Yours very truly, (S.) Aaron Finger.

F:T.

[fol. 335] In the Chancery Court, New Castle County

Stipulation Regarding Exhibits to Answer—Filed May 18, 1938

And now, to-wit, this 23rd day of March, A. D. 1938, it is stipulated by and between Aaron Finger, Esq., solicitor for Julian Riley and Hughes Spalding, Executors under the last Will and Testament of Julia M. Hungerford, deceased, one of the respondents above named, and Clarence A. Southerland, Esq., solicitor for The New York Trust Company, Temporary Administrator of the Estate of Julia M. Hungerford, deceased, one of the defendants above named, as follows:

1. The papers hereto attached, marked respectively Exhibit "A" and Exhibit "B", are true and correct copies

of an order and a decree entered by the Surrogates' Court for New York County, State of New York, on February 14, 1938, in a proceeding in that Court entitled "In the matter of proving the last Will and Testament of Julia M. Hungerford, deceased."

2. For the purpose of the pending motion for decree notwithstanding answer, the said exhibits may be considered by the Chancellor as part of the record in the above entitled cause with like effect as though the pleading in the nature of an answer filed by The New York Trust Company, Temporary Administrator as aforesaid, had been duly amended, and the purport of the said exhibits duly pleaded, and the said exhibits, or copies thereof, had been attached to such amended answer.

3. The service referred to on page 2 of Exhibit "A" in the following language:

"And it further appearing that a citation was duly issued and served upon all the parties interested in the estate of the above-named decedent and that proof has been taken as to the contents of said will and its due execution."

[fol. 336] was made in the following manner: By publication of the citation in the "New York Law Journal" and in "The Chief," once a week for four (4) successive weeks, and a supplemental citation was likewise published in like manner and a copy thereof sent by mail to Hughes Spalding, Julian Riley, Julia G. Murphy and Katherine M. Riley, to their addresses or places of abode in Fulton County, Georgia. A second supplemental citation was served upon Hughes Spalding and Julian Riley by Carl D. Levy on December 10, 1937, by giving Julian Riley and Hughes Spalding a copy thereof. The said Messrs. Riley and Spalding were outside of the State of New York and within the State of Georgia at the time of such service. Thereafter, on January 5, 1938, a copy of the petition, together with notice that objection was made to the issuance of letters testamentary to the Executors named, was delivered to Julian Riley and Hughes Spalding inside of the State of Georgia by a Notary Public.

Section 56 of the Surrogate's Court Act of the State of New York provides in part as follows:

"56. Service personally without the state, or by publication.

The surrogate from whose court a citation is issued or to be issued may make an order directing the service thereof personally without the state, or by publication, in either of the following cases:

1. Where it is to be served upon a foreign corporation, a joint stock association or other unincorporate association having a president and treasurer, neither of whom is a resident of this state or upon a person who is not a resident of the state."

The service above described was made pursuant to an order of the Surrogate under the authority of the above quoted statute.

4. This stipulation may be filed in the above entitled cause [fol. 337] and submitted to the Chancellor, in connection with the pending motion for decree notwithstanding answer, without further notice to either party.

Aaron Finger, Solicitor for Julian Riley and Hughes Spalding, Executors under the last Will and Testament of Julia M. Hungerford, deceased. C. A. Southerland, Solicitor for The New York Trust Company, Temporary Administrator of the estate of Julia M. Hungerford, deceased.

EXHIBIT "A" TO STIPULATION

(Defendants Exhibit No. 19)

At a Surrogates' Court for New York County, held at the Hall of Records of said County on the 14th day of February, 1938

Present Hon. James A. Delehanty, Surrogate

Other Consolidating Probate Proceedings

File No. P-1602-1936

In the Matter of Proving the Last Will and Testament of Julia M. Hungerford, Deceased

as a Will of Real and Personal Property

[fol. 338] It appearing to the satisfaction of the Surrogate that on or about the 12th day of June, 1936 the State

Tax Commission of the State of New York filed a petition for the probate of the Last Will and Testament of Julia M. Hungerford, bearing date the 12th day of August, 1933;

And it further appearing that an action in the nature of a bill to interplead was brought in the United States District Court for the District of Georgia by Julian Riley and Hughes Spalding, the executors named in the said will which had been probated in Georgia, interpleading the State Tax Commission of the State of New York and the State Tax Commission of the State of Georgia, and that a temporary injunction was issued thereunder, and that thereafter and on or about the 15th day of October, 1937, an application was made to this Court by O. Robert Hungerford, the husband of the decedent, for leave to file a petition for the probate of the said will, and that lease to file a petition for probate was granted to the said O. Robert Hungerford pursuant to an order of the Hon. James A. Delehanty, one of the Surrogates of this Court, dated October 23, 1937, and that O. Robert Hungerford duly filed such a petition for probate and objections to the issuance of Letters Testamentary to the executors named in said will;

And it further appearing that a citation was duly issued and served upon all the parties interested in the estate of the above-named decedent and that proof has been taken as to the contents of said will and its due execution;

And it further appearing that the said temporary injunction against the State Tax Commission of the State of New York, heretofore granted by the United States District Court for the District of Georgia, has been dissolved,

[fol. 339] Now, upon the consent of the State Tax Commission of the State of New York and O. Robert Hungerford, signed by their respective attorneys, and on motion of Baldwin, Todd & Young, Esqs., attorneys for O. Robert Hungerford, and on motion of Edgar Hirschberg, Esq., attorney for the State Tax Commission of the State of New York, it is

Ordered that the proceedings for the probate of the Last Will and Testament of Julia M. Hungerford, deceased, heretofore brought by the State Tax Commission of the State of New York by a petition dated June 12, 1936, be and the same hereby is consolidated with the proceeding for the probate of said Last Will and Testament of said Julia M.

Hungerford, deceased, pursuant to the petition of said O. Robert Hungerford dated the 15th day of October, 1937.

James A. Delehanty, Surrogate.

We hereby consent to the entry of the foregoing order Edgar Hirschberg, Attorney for the State Tax Commission of the State of New York. Baldwin, Todd & Young, Attorneys for O. Robert Hungerford.

[fol. 340] EXHIBIT "B" TO STIPULATION

At a Surrogates' Court for New York County, Held at the Hall of Records of said County on the 14th Day of February, 1938

Present: Hon. James A. Delehanty, Surrogate

Decree Dispensing With Testimony, Fixing Domicile, Directing Temporary Administrator to Act Pending Issuance of Letters

In the Matter of Proving the Last Will and Testament of JULIA M. HUNGERFORD, Deceased,

as a Will of Real and Personal Property

Staying Issuance of Letters to Executors Named in the Will and Admitting Will to Probate—Filed P-1602-1936

A petition for probate having been duly filed herein by the State Tax Commission of the State of New York, and said State Tax Commission having been temporarily stayed from proceeding further herein pursuaut to an order of the United States District Court for the District of Georgia, and leave having been granted, during the continuance of such stay, to O. Robert Hungerford to file a petition for probate herein, and said petition having been duly filed and citation herein having been duly issued, served and returned, and the allegations of the parties having been heard and the proofs having been duly taken by Commission duly issued to R. Emerson Gardner by order of this Court dated [fol. 341] December 10, 1937, and returned the 19th day of December, 1937, among other things, as to the execution of said instrument bearing date the 12th day of August, 1933, and the probate of the said Will not having been con-

tested, and the injunction of the United States District Court for the District of Georgia having been dissolved, and the said proceeding brought by the State Tax Commission of the State of New York having been duly consolidated with the proceeding brought by O. Robert Hungerford pursuant to an order of the Hon. James A. Delehanty, dated February 14, 1938, and it appearing that the testimony of John A. Sibley and L. E. McKnight cannot with due diligence be obtained, and it appearing to the Surrogate that the Will was duly executed and that the Testatrix at the time of executing it was in all respects competent to make a Will and not under restraint, and it further appearing to the satisfaction of the Surrogate that the decedent was a resident of and domiciled in the County and State of New York at the time of her death, and objection having been filed herein to the issuance of Letters Testamentary to Hughes Spalding and Julian Riley, the persons named as Executors in said Will, and said objections having been duly served upon the aforesaid Hughes Spalding and Julian Riley personally without the State of New York, and it further appearing that it is essential to the preservation of the Estate that New York Trust Company, the temporary administrator appointed by this Court the 22nd day of January, 1936, continue to act as such until qualification of an Executor hereunder, it is

Ordered, Adjudged and Decreed that the testimony of John A. Sibley and L. E. McKnight, subscribing witnesses to the Will of decedent dated August 12, 1933, be and it hereby is dispensed with; and it is further

Ordered, Adjudged and Decreed that decedent at the time of her death was a resident of and domiciled in the County [fol. 342] and State of New York; and it is further

Ordered, Adjudged and Decreed that the instrument offered for probate herein be and the same hereby is admitted to original probate as the Last Will and Testament of the said deceased, a resident of this State, valid to pass real and personal property; and it is further

Ordered, Adjudged and Decreed that the granting of Letters Testamentary under the Last Will and Testament of said deceased be and it hereby is stayed until further order of this Court; and it is further

Ordered, Adjudged and Decreed that New York Trust Company, heretofore appointed Temporary Administrator, continue to act as such pending the determination of this

Court granting Letters Testamentary, or of Administration, c. t. a., and the qualification of the Executor Executors or Administrator named therein; and it is further

Ordered, Adjudged and Decreed that the Will be admitted to probate in the following words and figures:

"Georgia, Fulton County:

I, Julia M. Hungerford, being of sound and disposing mind and memory, do make, declare and publish this as my last Will and Testament, hereby revoking any and all other wills which I may have previously made.

Item 1. I will and desire that my body receive proper burial, and that my funeral expenses and the expenses of my last illness be paid out of any monies belonging to my estate, and that all of my just debts be paid as promptly after my death as is consistent with the best interest of my estate.

[fol. 343] Item 2. I give and bequeath to my husband, Robert Hungerford, the sum of Five Thousand Dollars ($5,000.00), in cash, and the diamond link bracelet, diamond wrist watch, and diamond ring containing two (2) diamonds and one (1) ruby, which articles of jewelry he gave to me.

Item 3. All the rest, residue and remainder of my estate of every kind and character, wherever situated, I give, bequeath and devise, share and share alike, absolutely and in fee simple, to my Mother, Julia G. Murphy, and to my sister, Katherine M. Riley. Should either my Mother or my Sister predecease me, I give, bequeath and devise, absolutely and in fee simple, the share of my estate which such deceased Mother or Sister would have received to the survivor.

Item 4. I hereby nominate, constitute and appoint my brother-in-law, Julian Riley, and my friend, Hughes Spalding, executors of this my last Will and Testament. I direct that no bond be required of them, and that no inventory or appraisement of my estate be made, nor that they be required to make any reports to the Court of Ordinary or other Court. It is my Will that they wind up my estate and administer the same under the terms of this Will without any *any* Court proceedings whatever. They

are required, however, as soon after my death as is practical, to make a full and complete list of all of my property, and to furnish a copy of the same to my Mother and to my Sister.

Item 5. My said Executors are empowered, for the purpose of paying my debts and/or for distribution, to sell and dispose of any portion or all of my estate at public or private sale, without order of any court, and upon such terms as in their judgment they think best. They may execute any and all deeds, conveyances, bonds for title, bills of sale, transfers, assignments, or any other writing [fol. 344] or writings which in their judgment are proper or necessary to carry out the powers given them.

In Witness Whereof, I have hereunto set my hand and seal on this the 12th day of August, 1933.

Julia M. Hungerford. (Seal.)

Signed, sealed, declared and published by the said Julia M. Hungerford, as her last Will and Testament, in the presence of us, the undersigned, who at the special instance and request of the Testatrix, and in her presence, and in the presence of each other, have subscribed the same as witnesses.

This the 12th day of August, 1933.

John A. Sibley, Sumter M. Kelley, L. E. McKnight."

James A. Delehanty, Surrogate.

We hereby consent to the entry of the foregoing decree.

Edgar Hirschberg, Attorney for State Tax Commission; Baldwin, Todd & Young, Attorneys for O. Robert Hungerford.

[fol. 345] In the Chancery Court, New Castle County

Stipulation Regarding Exhibits to Answer—Filed May 18, 1938

And now, to-wit, this 7th day of May, A. D. 1938, for the purpose of the pending motion for decree notwithstanding answer, it is stipulated by and between Aaron Finger, solicitor for Julian Riley and Hughes Spalding, Executors under the last Will and Testament of Julia M.

Hungerford, deceased, certain of the respondents above named, and Clarence A. Southerland, solicitor for The New York Trust Company, Temporary Administrator of the Estate of Julia M. Hungerford, deceased, the other respondent above named, and also for The New York Trust Company, Administrator with the Will Annexed on the Estate of Julia M. Hungerford, deceased, as follows:

1. The paper hereto attached, marked Exhibit "A" is a true and correct copy of an order entered by the Surrogate's Court for New York County, State of New York, on April 26, 1938, in a proceeding in that Court entitled "In the Matter of an Application for Letters of Administration with the Will Annexed on the Estate of Julia M. Hungerford, Deceased". The paper hereto attached, marked Exhibit "B", is a duly executed certificate of the issuance of Letters of Administration with the Will Annexed on the Estate of Julia M. Hungerford, deceased, to The New York Trust Company, a corporation of the State of New York.

2. For the purpose of the pending motion for decree notwithstanding answer, the said exhibits may be considered by the Chancellor as part of the record in the above entitled cause with like effect as though the pleading in the nature of an answer filed by The New York Trust Company, Temporary Administrator as aforesaid, had been duly amended, and the purport of the said exhibits duly pleaded, and the said exhibits, or copies thereof, had been attached to such amended answer.

[fol. 346] 3. For the purpose of the pending motion for decree notwithstanding answer, The New York Trust Company, a corporation of the State of New York, Administrator with the Will Annexed of the Estate of Julia M. Hungerford, deceased, shall be forthwith deemed to be substituted as respondent in this cause in lieu of "The New York Trust Company, a corporation of the State of New York, as Temporary Administrator of the Estate of Julia M. Hungerford, Deceased."

4. The service referred to an page 2 of Exhibit "A" hereto attached, in the following language:

"A citation having been issued on said petition requiring Julia G. Murphy, the mother of the decedent and Katherine M. Riley, the sister of the decedent, the sole residuary

legatees named in said will, to show cause why Letters of Administration with the will annexed of the goods, chattels and credits of Julia M. Hungerford, deceased, to The New York Trust Company and due proof of service thereof having been filed herein;"

was made in a manner substantially similar to the manner set forth in paragraph 3 of the stipulation of the parties filed in this cause on March 23, 1938, and pursuant to the statute of the State of New York set forth in the said paragraph 3 of the said stipulation of March 23, 1938.

5. This stipulation may be filed in the above entitled cause and submitted to the Chancellor in connection with the pending motion for decree notwithstanding answer, without further notice to either party.

Aaron Finger, Solicitor for Julian Riley and Hughes Spalding, Executors under the last Will and Testament of Julia M. Hungerford, deceased.

[fol. 347] Clarence A. Southerland, Solicitor for The New York Trust Company, Temporary Administrator of the Estate of Julia M. Hungerford, deceased, and for The New York Trust Company, Administrator with the Will Annexed of the Estate of Julia M. Hungerford, deceased.

EXHIBIT "A" TO STIPULATION

(Defendants Exhibit No. 20)

At a Surrogates' Court for New York County, held at the Hall of Records of said County on the 26th day of April, 1938.

Present: Hon. James A. Delehanty, Surrogate

In the Matter of an Application for Letters of Administration with the Will Annexed on the Estate of Julia M. Hungerford, Deceased.

ORDER DENYING ISSUANCE OF LETTERS OF ADMINISTRATION TO RESIDUARY LEGATEE AND GRANTING LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED TO THE NEW YORK TRUST COMPANY. P-1602-1936

[fol. 348] An order having been made and entered herein on the 14th day of February, 1938, admitting the Last Will

and Testament of Julia M. Hungerford, deceased, to probate; and

Objections to the issuance of Letters Testamentary to Hughes Spalding and Julian Riley, the Executors named in said Last Will and Testament, having been filed and come on for hearing, and an order sustaining said objections and denying the issuance of Letters Testamentary to said Executors having been made and entered herein on the 30th day of March, 1938; and

O. Robert Hungerford, the husband of Julia M. Hungerford, deceased, having heretofore filed herein his renunciation of Letters of Administration with the will annexed; and

The Public Administrator for the County of New York having heretofore applied for authority to renounce the issuance of Letters of Administration with the will annexed on said estate and an order having been made herein, on the 1st day of April, 1938 permitting the Public Administrator to renounce his right to administer and excusing him from acting as said Administrator; and

Upon reading and filing the petition of O. Robert Hungerford and the State Tax Commission of the State of New York, praying for the issuance of Letters of Administration with the will annexed of the goods, chattels and credits of Julia M. Hungerford, deceased, to The New York Trust Company; and

A citation having been issued on said petition requiring Julia G. Murphy, the mother of the decedent, and Katherine M. Riley, the sister of the decedent, the sole residuary legatees named in said will; to show cause why Letters of Administration with the will annexed of the goods, chattels and credits of Julia M. Hungerford, deceased, to The New York Trust Company and due proof of service thereof having been filed herein; and

[fol. 349] The said petition having duly come on for hearing on the 26th day of April, 1938, and the said Julia G. Murphy and Katherine M. Riley having failed to appear at the time and place specified in said citation, and O. Robert Hungerford having appeared by Baldwin, Todd & Young, his attorneys; and

The New York Trust Company having heretofore filed its consent to act as Administrator with the will annexed of the goods, chattels and credits of Julia M. Hungerford, deceased, and designated the Clerk of the Surrogates' Court

of the County of New York as a person on whom service of process may be made; and

There being no person or persons, other than Julia G. Murphy and Katherine M. Riley, who have a prior or equal right to Letters of Administration with the will annexed who have not been precluded or who have not renounced; and it appearing that the best interests of said estate require the appointment of The New York Trust Company as Administrator with the will annexed of the goods, chattels and credits of Julia M. Hungerford, deceased; and

After due deliberation, it is

Ordered, that Letters of Administration with the will annexed of the goods, chattels and credits of said Julia M. Hungerford, deceased, be denied to said Julia G. Murphy and Katherine M. Riley; and it is

Further ordered, that Letters of Administration with the will annexed of the goods, chattels and credits of Julia M. Hungerford, deceased be and they hereby are granted and issued to The New York Trust Company of No. 100 Broadway, Borough of Manhattan, County, City and State of New York.

James A. Delehanty, Surrogate.

[fol. 350] Original filed April 26, 1938. A true copy. Charles P. Sheridan, Clerk of the Surrogates' Court.

EXHIBIT B TO STIPULATION

No. 453573

The People of the State of New York to all whom these Presents Shall Come or May Concern, send greeting:

Know ye, that we, having inspected the Records of our Surrogate's Court, in and for the County of New York; do find that on the 26th day of April, in the year one thousand nine hundred and thirty-eight, by said Court, Letters of Administration with the will annexed of the goods, chattels and credits of Julia M. Hungerford, late of the County of New York, deceased, were granted unto The New York Trust Company of the City of New York, N. Y., and that it does not appear by said Records that said Letters have been revoked.

In Testimony whereof, we have caused the Seal of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Hon. James A. Delehanty, a Surrogate of our said County, in the City of New York, the 27th day of April, in the year of our Lord one thousand nine hundred and thirty-eight.

Charles P. Sheridan, Clerk of the Surrogate's Court.
(Seal.)

[fol. 351] In the Chancery Court, New Castle County

Opinion of Chancellor Wolcott on Motion for Decree Notwithstanding Answer—Filed May 16, 1938

Bill of Interpleader. On November 28, 1935, Julia M. Hungerford died in Atlanta, Fulton County, Georgia. She was the owner of six hundred and twenty-six shares of the common stock and six hundred and twenty-six shares of the Class A stock of the complainant. The shares were registered in the name of Julia M. Whitemarsh, which was her name prior to her intermarriage with O. Robert Hungerford.

Mrs. Hungerford left a will in which she disposed of her estate. The will was proved first in common form and then in solemn form before the Court of Ordinary in Fulton County, Georgia, according to the laws of Georgia, and letters testamentary were granted to the executors therein named. They are the defendants, Julian Riley and Hughes Spalding.

Proof of a will in common form in Georgia appears to be an ex parte proceeding. Proof in solemn form is after citation to the heirs at law of the deceased.

Having proved the will in common form, the executors petitioned to prove the same in solemn form. Citation was issued to Robert Hungerford, Julia G. Murphy and Katherine M. Riley, the husband, mother and sister respectively of the testatrix and her only heirs at law.

Appearing in response to the citation Mr. Hungerford filed a caveat to the will on the ground of lack of testamentary capacity. The caveat, after alleging that the testatrix was not of sound and disposing mind and memory, contains the following paragraph:

"The petition to probate the said will incorrectly recites that the said decedent was a resident of Fulton County, Georgia, which is not correct, since the said decedent was [fol. 352] domiciled in the State of New York at the time of her death and was temporarily visiting in Fulton County, Georgia. This recital is made, however, merely as a matter of record since the caveator acknowledges that there is real estate of the decedent located in Fulton County, Georgia, and hence the legal domicile of the decedent is not an issuable matter on a proceeding the sole purpose of which is to admit to record in solemn form an alleged will."

On January 6, 1936, the Ordinary, after having heard the evidence introduced before him, found not only that the decedent was of sound and disposing mind and memory, but also that she died a resident of and domiciled in Fulton County, Georgia, thus refusing to treat the question of the decedent's domicile as a non-issuable matter. He accordingly overruled the caveat "upon both grounds thereof" and admitted the will to probate in solemn form.

Thereupon Mr. Hungerford appealed to the Superior Court of Fulton County, Georgia. The attorneys for the propounders moved to strike from the caveat the paragraph above quoted on the ground that the same did not set forth any grounds of objection to the probate of the will, that it tendered no issuable fact or reason for refusing probate, that the paragraph contained merely a recital of alleged fact without tendering it as an issuable matter, that it sought to set up a different ground of jurisdiction than that relied upon by the propounders, and that while the propounders had offered the will for probate on the jurisdictional ground that the testatrix was a resident of Fulton County and domiciled therein at the time of her death and while it was permissible for the caveator to contest that allegation, yet he should be required to do so, in a clear and unequivocal manner and not by way of a non-issuable recital such as was made in his caveat.

Thereupon the caveator, admitting that the paragraph of his caveat which was the subject of the motion "Does not [fol. 353] offer or advance an issuable fact," for that reason alone amended his caveat by striking therefrom the portion thereof which the propounders moved to strike.

Thereafter the cause was submitted to a jury. The jury returned a verdict finding in favor of the will and that Mrs.

Hungerford resided and was domiciled in Fulton County, Georgia, at the time of her death, and the Superior Court entered judgment thereon.

Mr. Hungerford sued out a writ of error on the ground that the domicile of the testatrix was not an issue under the pleadings and therefore the verdict and judgment entered thereon were improperly entered. The Supreme Court of Georgia on November 14, 1936, the Chief Justice dissenting, held that under the pleadings and the law of Georgia it was necessary in order to admit the will to probate to show that the decedent was domiciled in Fulton County, as otherwise the Court of Ordinary would not have had jurisdiction. The judgment below was therefore affirmed.

During the pendency of the proceedings in the Court of Ordinary, after the will had been probated in common form and letters issued thereon, and after Mr. Hungerford had been cited to appear in the proceedings to probate the will in solemn form but before such probate had been completed, he filed an application in the Surrogate's Court of New York County, New York, asking for the appointment of a temporary administrator for the decedent, alleging that the decedent was a resident of New York and that she died without leaving any valid will. The petition referred to the Georgia proceedings. Upon the petition the defendant New York Trust Company was appointed as temporary administrator by the Surrogate's Court in New York. Later the State Tax Commission of New York filed in the Surrogate's Court a petition praying that the will of Mrs. Hungerford be admitted to probate and that letters of administration c. t. a. be granted thereon.

[fol. 354] Since this cause was argued, the will has been probated in New York and letters of administration c. t. a. issued to the New York Trust Company. The parties have so stipulated and have also stipulated that for the purposes of the pending motion the New York Trust Company, as administrator c. t. a., is to be considered as a party to this cause.

The certificates evidencing the stock which Mrs. Hungerford owned are in the possession of the Georgia executors who have demanded of the complainant that it transfer the stock into their names as executors. Mr. Hungerford, after the filing by him in New York of his petition for the appointment of a temporary administrator, but before the Surrogate acted thereon, notified the complainant of the

pendency of the New York petition and that no one other than a representative appointed by the courts of New York would be authorized to receive dividends on stocks owned by the decedent.

Without going further into details concerning the various steps taken and proceedings inaugurated by the interested parties, the upshot of the controversy over the question of Mrs. Hungerford's domicile and the proper jurisdiction for the administering of her estate was the filing of the pending bill by the complainant, calling upon the Georgia executors and the New York Trust Company as temporary administrator in New York to interplead their respective rights to the Coca-Cola stock.

A decree to interplead was entered and the interpleading was directed to proceed by the filing of an answer by the Georgia executors which was to stand in the nature of a bill of complaint setting forth the claim of the Georgia executors, and New York Trust Company, as temporary administrator, was directed to file its answer or other appropriate pleading to the answer of the Georgia executors, and thereafter the cause should proceed according to the rules and practice of this court, each of the interpleading defendants to have the [fol. 355] right to file such additional pleadings as the nature of the case may require.

The Georgia executors filed their answer in the nature of a bill of complaint in due course, to which New York Trust Company, temporary administrator in New York, duly filed an answer.

Thereupon the Georgia executors, upon their answer in the nature of a bill of complaint, as amended, moved for a decree against New York Trust Company, as temporary administrator, notwithstanding the pleading in the nature of an answer, as amended, filed by said New York Trust Company, temporary administrator.

In disposing of the motion the Chancellor filed the following memorandum.

Hugh M. Morris and Ivan Culbertson, for complainant.

Aaron Finger, of the firm of Richards, Layton and Finger, and Dan MacDougald and James A. Branch, both of Atlanta, Ga., for Julian Riley and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, deceased.

Clarence A. Southerland, of the firm of Ward and Gray, Baldwin, Codd & Young, of New York City of counsel, for

New York Trust Company, temporary administrator of Estate of Julia M. Hungerford, deceased.

The Chancellor: When the bill in this case was filed and until recently, viz., on May 7, 1938, the date of a stipulation entered into between the parties, the only possible claimants to the stock, so far as the pleadings show, were the Georgia executors on the one hand and the New York temporary administrator on the other. The stipulation just referred to, however, shows that the will has been proved recently in [fol. 356] New York and an administrator c. t. a. has been appointed in that jurisdiction. The appointment of the temporary administrator was upon the theory of an intestacy. The appointment of the administrator c. t. a. was upon the theory of a testacy. The authority of the temporary administrator, whatever it was, has been supplanted by that of the administrator c. t. a. In re Shonts' Estate, 178 N. Y. S. 762.

It follows, therefore, that the defendant, the temporary administrator, has no right to the stock. This is so not because of any superior virtue in the right of the Georgia executors, but because the office in virtue of which the temporary administrator in New York asserted its right has been superceded in all respects by an administrator c. t. a. appointed in the same New York jurisdiction.

The cause is before the court on a motion by the Georgia executors upon their answer in the nature of a bill of complaint for a decree notwithstanding the answer of the temporary administrator. When such a motion is made in the ordinary case it is under Rule 44 of this court. Under that rule the Chancellor may in a proper case in his discretion decline to decide the cause upon such motion.

I am of the opinion that I should decline to decide the cause on the pending motion, notwithstanding the temporary administrator has now, since the motion was made, become stripped of all authority under the law of its appointment. I take this view because to do otherwise might result in awarding the stock to the Georgia executors when the facts at present before the court raise a serious doubt, if they do not constitute a complete denial, of the right of the Georgia executors to administer the stock as against the administrator c. t. a. recently appointed in New York. Should this court, because the temporary administrator has no right to the stock, proceed to adjudicate the right to in favor of the Georgia executors, when it knows of the exist-

ence of the New York administrator c. t. a., without afford-
[fol. 357] ing an opportunity to the latter as successor to the administration rights of the temporary administrator to assert its claim? Whether it can do so in the pending suit, I do not now undertake to say. At all events, as the motion gives the cause somewhat of the posture of a bill for specific performance, it seems to me that the discretion that courts of equity exercise in such cases might well suggest that the relief, even if finally granted, ought certainly not to be granted at this stage. If as the cause proceeds nothing is done to bring the New York administrator c. t. a. into the case as a party, if that can be done, then the matter of granting relief to the Georgia executors might present itself in another light, though on that I abstain from expressing any opinion.

I suggested a moment ago that under the facts now before the court there is a serious doubt, if not an insurmountable obstacle, confronting the right of the Georgia executors to possession of the stock. The facts I refer to are that a New York court of appropriate jurisdiction has adjudicated the domicile of Mrs. Hungerford to have been in New York at the time of her death. Not only so, for the purposes of the pending motion the Georgia executors admit that her domicile was in fact in New York. Their motion under Rule 44 admits for the purposes of the motion all the facts set forth in the adversary's answer; and the answer avers as a fact that Mrs. Hungerford was a resident and domociled in New York at the time of her death.

On these facts, the case at present is therefore one where personal property located in this State belonging to the estate of a decedent admittedly domiciled in New York is sought to be recovered for administration in the State of Georgia. Where that is the case, it is very much to be doubted whether a Delaware court will direct property located here to be transmitted for administration to a jurisdiction which is foreign to the domicile of the decedent, even in the absence of opposition from the domiciliary jurisdiction. At all events, it would seem that the court
[fol. 358] here ought not to act in a summary way in favor of a foreign administration when a representative of the domocile has been seeking to assert an opposing claim and has been defeated only because a representative of higher

dignity in the domicile has succeeded to all the rights of administration.

The domiciliary representative of a deceased person is entitled to receive and administer all the personal estate of the deceased wherever found, subject to the right of a foreign state to administer property within its borders for the protection of its own citizens. That is a proposition of practically uniform acceptance in this country. It impliedly inheres in the language of the Court of Errors and Appeals of this State in Deringer's Adm'r. v. Deringer's Adm'r., 5 Houst. 416, 431, where that court said: "The great rule in the settlement of estates is that personal property is distributed by the law of the domicile, and that prevails where it does not conflict with the *lex rei sitae*." In Wilkinson v. Ellett, Adm., 9 Wall. 740, the Supreme Court of the United States, after stating the general principle to be long settled that "the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile * * *," proceeded further to say that "the original administrator, therefore, with letters taken out at the place of the domicile, is invested with the title of all the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue, according to the law of the place, or directions of the will, as the case may be." "If any portion of the estate," says the court, "is situated in another country, the domiciliary representative cannot recover possession by suit without taking out letters of administration from the proper tribunal in that country; as the original letters can confer upon him no extra-territorial authority. The difficulty does not lie in any defect of title to the possession, but in a limitation or qualification of the general principle in respect of personal [fol. 359] property by the comity of nations, founded upon the policy of the foreign country to protect the interests of its home creditors. These letters are regarded as merely ancillary to the original letters, as to the collection and distribution of the effects; and generally are subservient to the claims of the domestic creditors, the residium being transmitted to the probate court of the country of the domicile for the final settlement of the estate."

The rule which the cited case announces, that if suit is necessary to recover personal property in a jurisdiction

foreign to that of the domicile of the deceased, ancillary letters must be taken out in the foreign jurisdiction, is not applicable in Delaware because of statutory provisions to the contrary. Terry v. Stull, 19 Del. Ch. 412, 168 A. 251. But the principle remains unimpaired, subject of course to local law, that the effects found in this jurisdiction of a non-resident decedent generally to be administered according to the law of, and by the representative appointed in, the jurisdiction of the domicile.

Now in the instant case it appears that two jurisdictions have appointed testamentary representatives of the estate of the deceased, each on the theory that she was domiciled therein. The answer of the New York temporary administrator avers that the deceased was domiciled in New York at the time of her death. The motion of the Georgia executors for a decree notwithstanding this answer admits the truth of that averment.

The Georgia executors insist, however, that the question of domicile was formally adjudicated in Georgia as being in that State, in proceedings to which all the heirs at law were parties, and that under the full faith and credit clause of the constitution of the United States and the act of congress passed in pursuance thereof, such judgment is conclusive of the fact, even against the admitted truth to the contrary. Full faith and credit are, to be sure, to be given to [fol. 360] the Georgia judgment. Like faith and credit are also to be given to the New York judgment which adjudges the domicile to have been in New York. But the judgment in each case is to be given effect only to the extent jurisdiction existed to render it. The full faith and credit clause does not preclude an inquiry into the jurisdiction of the court in which judgment is rendered, over the subject matter, or the parties affected by it, or into the facts necessary to give such jurisdiction. Mitchell, Vance & Co. v. Ferris & Co., 5 Houst. 34; Thorman v. Frame, 176 U. S. 350.

The appointment of executors in Georgia as well as the appointment of the administrator c. t. a. in New York, were judgments essentially in rem. They were final and conclusive as to property of the decedent located in the appointing jurisdiction; and properly located in this jurisdiction is not within the subject matter upon which either of those judgments operates. Overly v. Gordon, 177 U. S. 214.

It might be that if any of the parties who were cited to appear and did appear in the proceedings to probate the

will in solemn form in Georgia were to seek elsewhere to re-litigate against the executors there appointed the question of the Georgia domicile, the executors who conducted the Georgia proceedings might plead the Georgia judgment as an estoppel against them, on the theory that in that situation the Georgia judgment had the effect on the contesting party of one in personam, though on this I express no opinion. But that contention cannot be made in this case for the reason that the New York administrator was neither a party to the proceedings nor in privity with such party.

The Georgia executors appear to lay great stress on Matter of Cornell, 267 N. Y. 456, 196 N. E. 396, 101 A. L. R. 1502, as sustaining their position that the adjudication by the Georgia courts that Mrs. Hungerford was domiciled in that [fol. 361] state, is conclusive against the New York administration. I think they misconceive the purport of that case. All that was determined in the Matter of Cornell, supra, was that the Surrogate's Court in New York had the discretion to refuse to pass on the question of the domicile of a deceased non-resident who left personal property located in New York, where the contest was between personal representatives of the deceased appointed in two different jurisdictions, in each of which the personal representative there appointed claimed the deceased was domiciled. That question, viz., whether there is discretion in the matter, is not under debate here. In the course of its opinion the Court of Appeals in New York clearly recognized the propriety of an adjudication in New York of the question of the decedent's domicile as between two foreign jurisdictions, if in the discretion of the Surrogate's Court such an adjudication ought to be made.

And so, here, likewise I conclude that there is power in the appropriate Delaware tribunals to determine, so far as the property located here is concerned, where the deceased was domiciled at the time of her death to the end that the local effects may be sent to the seat of domiciliary administration.

In face of the present admission that the decedent was a resident of New York and lawfully domiciled therein at the time of her death, I am of the opinion that the stock in dispute should not now be ordered to be transferred to

the executors appointed in Georgia and that the motion for a decree notwithstanding answer should be denied.

Order accordingly.

May 16, 1938.

J. O. Wolcott, Chancellor.

[fol. 362] In the Chancery Court, New Castle County

Order Denying Motion for Decree Notwithstanding Answer—May 27, 1938

And now, to-wit, this 27th day of May, A. D. 1938, the above stated cause having come on to be heard upon the motion for decree notwithstanding answer made by Julian Riley and Hughes Spalding, Executors under the last Will and Testament of Julia M. Hungerford, deceased, and the same having been fully argued and considered by the Chancellor, it is

Ordered and Decreed that the said motion be and the same is hereby denied.

J. O. Wolcott, Chancellor.

In the Chancery Court, New Castle County

Stipulation Relating to Addition of New York Trust Co. as Party Respondent and Order Thereon—June 29, 1938

It is hereby stipulated by and between Hugh M. Morris and Alexander L. Nichols, solicitors for Coca-Cola International Corporation, the complainant above named, and Aaron Finger, solicitor for Julian Riley and Hughes Spalding, as executors of the Estate of Julia M. Hungerford, Deceased, two of the respondents above named, and Clarence A. Southerland, solicitor for The New York Trust Com-[fol. 363] pany, as temporary administrator of the Estate of Julia M. Hungerford, Deceased, the other of the respondents above named, and Clarence A. Southerland, solicitor for The New York Trust Company, a corporation of the State of New York, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, as follows:

1. The New York Trust Company, a corporation of the State of New York, Administrator c. t. a. of the estate of Julia M. Hungerford, Deceased, shall be made an additional party respondent to the above entitled cause, and may assert in the said cause its claim to the 626 shares of the common stock and to the 626 shares of the Class A stock of Coca-Cola International Corporation, the complainant above named, mentioned and described in the original bill of complaint filed in this cause by the said complainant.

2. This stipulation may be presented to the Chancellor and an appropriate order thereon entered without further notice to any party.

June 28, 1938.

Hugh M. Morris, Alexander L. Nichols, Solicitors for Coca-Cola International Corporation, the complainant above named. Aaron Finger, Solicitor for Julian Riley and Hughes Spalding, as executors of the Estate of Julia M. Hungerford, Deceased, two of the respondents above named. C. A. Southerland, Solicitor for The New York Trust [fol. 364] Company, as temporary administrator of the Estate of Julia M. Hungerford, Deceased, the other of the respondents above named. C. A. Southerland, Solicitor for The New York Trust Company, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased.

Upon which stipulation the following order was entered:

And now, to-wit, this 29th day of June, A. D. 1938, the foregoing stipulation having been presented to, read and considered by the Chancellor, it is, upon motion of Clarence A. Southerland, Esq., solicitor for The New York Trust Company, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased,

Ordered by the Chancellor that The New York Trust Company, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, is hereby made an additional party respondent in the above entitled cause and may prosecute and assert in the said cause its claim to the 626 shares of the common stock and to the 626 shares of the Class A stock of Coca-Cola International Corporation, complainant

above named, mentioned and described in the original bill of complaint filed in this cause by the said complainant.

J. O. Wolcott, Chancellor.

IN THE CHANCERY COURT, NEW CASTLE COUNTY

STIPULATION AS TO PLEADINGS—Filed June 29, 1938

And now, to-wit, this 29th day of June, A. D. 1938, it is hereby stipulated and agreed by and between Aaron Finger, solicitor for Julian Riley and Hughes Spalding, as Executors of the estate of Julia M. Hungerford, Deceased [fol. 365] two of the respondents above named, and Clarence A. Southerland, solicitor for The New York Trust Company, Administrator c. t. a. of the Estate of Julia M. Hungerford, as follows:

1. The pleading in the nature of a bill of complaint heretofore filed in this cause on June 8, 1936, by the said Julian Riley and Hughes Spalding, as executors as aforesaid, two of the respondents above named, as the said pleading has been heretofore amended, shall stand as and for a bill of complaint by the said Julian Riley and Hughes Spalding, as executors as aforesaid, filed against the said The New York Trust Company, Administrator c. t. a. as aforesaid, asserting the claim of the said executors to the 626 shares of common stock and to the 626 shares of the Class A stock of Coca-Cola International Corporation, the complainant above named.

2. The pleading in the nature of an answer heretofore filed by The New York Trust Company, as temporary administrator of the Estate of Julia M. Hungerford, Deceased, as the same has been heretofore amended, shall stand as and for the answer of The New York Trust Company, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, one of the respondents above named, to the said pleading of the said Julian Riley and Hughes Spalding, executors as aforesaid, in the nature of a bill of complaint, and the said pleading in the nature of an answer filed by The New York Trust Company, as temporary administrator as aforesaid, is hereby adopted by the said The New York Trust Company, Administrator c. t. a. as aforesaid, as and for its answer asserting its claim to the above described shares of stock, together

with an amendment thereto hereunto annexed and hereby tendered for filing.

3. The facts set forth in the several stipulations heretofore filed in this cause between the solicitor for The New York Trust Company, as temporary administrator as aforesaid, and the solicitor for Julian Riley and Hughes Spalding, as executors as aforesaid, dated April 11, 1937, [fol. 366] March 23, 1938, and May 7, 1938, including all exhibits annexed to any of the said stipulations, shall be deemed fully proved and part of the record of this cause, and such facts, or any of them, may be availed of by either party to this stipulation to the extent that any such facts may be material.

4. The stipulation may be presented to the Chancellor for the entry of an appropriate order thereon without further notice to either party.

Aaron Finger, Solicitor for Julian Riley and Hughes Spalding, as executors of the estate of Julia M. Hungerford, Deceased. C. A. Southerland, Solicitor for The New York Trust Company, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased.

To which stipulation the following was attached:

Amendment to Pleading in the Nature of An Answer of the New York Trust Company, a Corporation of the State of New York, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased.

To the Chancellor of the State of Delaware:

The New York Trust Company, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, by leave of the Chancellor first had and obtained, hereby amends the pleading in the nature of an answer heretofore filed in this cause by The New York Trust Company, as Temporary Administrator of the said estate, and adopted by The New York Trust Company, Administrator c. t. a. as aforesaid, as its pleading in the nature of an answer, as follows:

[fol. 367] 1. By adding to the said pleading in the nature of an answer the following additional paragraph, to be numbered 29:

29. Respondent further avers that since the filing in this cause of the pleading in the nature of an answer by The

New York Trust Company, as Temporary Administrator of the Estate of Julia M. Hungerford, Deceased, the following proceedings were duly had and taken in and before the Surrogate's Court of the County of New York, State of New York, in a certain cause in said court entitled "In the Matter of Proving the Last Will and Testament of Julia M. Hungerford, Deceased, as a Will of Real and Personal Property";

(a) By order of the said court, duly entered after notice in accordance with the statu-es of the State of New York in that behalf, certain proceedings for the probate of the last will and testament of Julia M. Hungerford, Deceased, heretofore brought by the State Tax Commission of the State of New York, by petition dated June 12, 1936, were duly consolidated with the proceedings for the probate of said last will and testament of said Julia M. Hungerford, Deceased, theretofore brought by O. Robert Hungerford, by petition dated October 15, 1937. A copy of said order is attached as Exhibit "A" to the stipulation heretofore filed in this cause dated March 23, 1938.

(b) By decree of the said Surrogate's Court for New York County, duly entered February 14, 1938, the said last will and testament of Julia M. Hungerford, Deceased, was duly admitted to original probate in the said court as the last will and testament of Julia M. Hungerford, Deceased, a resident of the State of New York; that in and by said decree it was adjudged and decreed by said court that the decedent at the time of her death was a resident of and [fol. 368] domiciled in the County and State of New York; and that in and by said decree it was adjudged and decreed that petitioner, as temporary administrator, continue to act as such pending the determination of the said Surrogate's Court granting letters testamentary, or of administration c. t. a. and the qualification of the executor, executors or administrator so to be named. A copy of the said decree so entered February 14, 1938, in the said court is attached as Exhibit "B" to the said stipulation filed in this cause dated March 23, 1938.

(c) By order of the said Surrogate's Court for New York County entered April 26, 1938, Letters of Administration with the Will annexed, of the goods, chattels and credits of the said Julia M. Hungerford, deceased, were duly granted and issued to your petitioner. A copy of the said

order is annexed as Exhibit "A" to the stipulation heretofore filed in this cause dated May 7, 1938.

(d) Your petitioner thereafter duly qualified as Administrator with the Will annexed of the Estate of Julia M. Hungerford, Deceased. A copy of the certificate of the Clerk of the Surrogate's Court evidencing such qualification is attached as Exhibit "B" to the said stipulation dated May 7, 1938, heretofore filed in this cause.

Your petitioner therefore avers that it is now the duly qualified and acting Administrator with the Will annexed of the Estate of Julia M. Hungerford, Deceased, a resident of and domiciled in the State of New York at the time of her death, and that as such Administrator with the Will annexed it is entitled to receive all goods, chattels, rights, credits and property of every description located or having a situs in the State of Delaware, in order that the same may be duly administered in accordance with the laws of the State of New York.

[fol. 369] 2. By striking out its answer to Paragraph 33 of the amendment to the bill of complaint verified December 10, 1936, which answer is contained in paragraph 3 of the amended answer of The New York Trust Company, as Temporary Administrator of the Estate of Julia M. Hungerford, Deceased, verified February 2, 1937, and inserting in lieu thereof the following:

"For answer to Paragraph 33 of the Amended Bill of complaint this defendant avers that all of the said matters and things therein set forth are irrelevant and immaterial, and for further answer thereto avers that the said cause so filed in the District Court of the United States for the Southern District of Georgia under the Federal Interpleader Act of January 20, 1936, was, subsequent to the filing of the said amendment to the Bill of Complaint verified December 10, 1936, dismissed, and the injunction heretofore issued in said cause was duly dissolved."

The New York Trust Company, by J. T. Maxwell, Vice-President.

Attest: M. Stuart, Assistant Secretary. (Corporate Seal.)

C. A. Southerland, Solicitor for The New York Trust Company, Administrator C. T. A. of the Estate of Julia M. Hungerford, Deceased. Baldwin, Todd & Young, New York City, of Counsel

[fol. 370] STATE OF NEW YORK,
County of New York, ss:

Be It Remembered that on this 25th day of June, A. D. 1938, personally came before me, the undersigned, a Notary Public for the State and County aforesaid, J. T. Maxwell, who being by me duly sworn according to law, did depose and say:

That he is Vice-President of The New York Trust Company, a corporation organized under the banking law of the State of New York, which was duly appointed Administrator with the Will annexed of the Estate of Julia M. Hungerford, Deceased; that he has read and is familiar with the contents of the foregoing amendment to the answer filed in this cause; that he was duly authorized to execute the same; that what is contained in said amendment so far as it relates to his own act and deed is true, and so far as it relates to the act or deed of any other person he believes it to be true.

J. T. Maxwell.

Sworn to and subscribed before me the day and year aforesaid. M. D. Thompson, Notary Public, Queens Co. No. 1953, Reg. No. 5478. Cert. filed in N. Y. Co. No. 201, Reg. No. 9T150. Cert. filed in Kings Co. No. 20, Reg. No. 9103. Commission Expires March 30, 1939. (Notarial Seal.)

Upon which stipulation and amendment the following order was entered:

[fols. 371-496] And, now, to-wit, this 29th day of June, A. D. 1938, the foregoing stipulation having been presented to, read and considered by the Chancellor, it is, upon motion of Clarence A. Southerland, Esq., solicitor for The New York Trust Company, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, one of the respondents above named,

Ordered by the Chancellor that the provisions of the said stipulation relating to the pleadings of the parties to said stipulation are hereby approved; and the amendment to the pleading in the nature of an answer heretofore filed in this cause by The New York Trust Company, as temporary administrator of the Estate of Julia M. Hungerford, Deceased, and adopted by The New York Trust Company, Administrator c. t. a. of the Estate of Julia M.

Hungerford, Deceased, which amendment is annexed to the said stipulation, is hereby ordered to be filed.

J. O. Wolcott, Chancellor.

[fol. 497] In the Chancery Court, New Castle County

Opinion of Chancellor Harrington—Filed September 20, 1939

Bill of interpleader originally filed by Coca-Cola International Corporation, a corporation of the State of Delaware, against the temporary administrator of Julia M. Hungerford, deceased, appointed in the State of New York, and the executors named in her will, which was probated in the first instance in Fulton County, Georgia.

The case was heard on oral testimony before the Chancellor, and on numerous depositions and exhibits.

The complainant's bill, in substance, alleged that Mrs. Hungerford died in Atlanta, Georgia on November 28th, 1935, and, at the time of her death, was the owner of 626 shares of Common stock and 626 shares of Class A stock of the complainant company; all of which stock was registered on the books of that corporation in the name of Julia M. Whitehead, which was Mrs. Hungerford's name prior to her marriage to O. Robert Hungerford on June 12th, 1932.

The sole question raised by the bill and the subsequent pleadings filed by the defendant was whether new certificates for the stock in question should be issued to the Georgia executors of Mrs. Hungerford, or to the New York administrator. That necessarily depended upon whether at the time of Mrs. Hungerford's death, she was legally domiciled in the State of Georgia, or in the State of New York; and the complainant's bill was filed in order that that question might be determined before the issuance of any such certificates.

Pursuant to the direction of this court, subsequent pleadings were filed both by the New York temporary administrator and by the executors named in Mrs. Hungerford's will, who had duly qualified in the State of Georgia, and to whom Letters Testamentary had been issued in that State.

[fol. 498] The answer, in the nature of a bill of complaint, filed by the Georgia executors, alleged in substance:

1. That, at the time of Mrs. Hungerford's death, she was domiciled in Fulton County, Georgia;

2. That, at any rate, because of the application of the rule of res adjudicata, that question could not be alleged in this proceeding.

The latter allegation was based on the further allegations that while, after the death of Mrs. Hungerford, her will was first proved in Fulton County, Georgia in an ex parte proceeding, known as "common form", it was subsequently proved in a judicial proceeding in the same county and state in what was known as "solemn form", and on citations duly issued and served on the heirs-at-law of the decedent and on O. Robert Hungerford, her husband, who had survived her; that Mr. Hungerford duly appeared in that proceeding and became a party thereto; that one of the material questions before the court, in which the will was probated, was whether, at the time of Mrs. Hungerford's death, she was domiciled in Fulton County, Georgia; that the Georgia court held that she was domiciled in that county and state, and its order probating the will was subsequently affirmed by the Supreme Court of that State.

The New York Trust Company, as temporary administrator of Mrs. Hungerford, appointed in the State of New York, filed an answer to the pleading filed by the Georgia executors, which alleged that at the time of her death Mrs. Hungerford was, in fact and in law, domiciled in the State of New York, and that no other State, therefore, had the right to appoint a general domiciliary representative of her estate. That answer also alleged that the State of New York had asserted a claim for inheritance taxes against Mrs. Hungerford's estate on the ground that she was domiciled in the State of New York at the time of her death.

[fol. 499] On February 13th, 1937 the Georgia executors moved for a decree, notwithstanding the amended answer of the New York Trust Company, as such temporary administrator. Before that motion was decided by the Chancellor, the will of Mrs. Hungerford had been probated in New York, and Letters of Administrator, c. t. a. had been issued to The New York Trust Company; all parties in interest filed a stipulation to that effect. It was, also, stip-

ulated that, for the purpose of the motion made by the Georgia executors, the New York Trust Company, as Administrator, c. t. a. should be considered a party to this cause.

On May 16th, 1938 the Chancellor filed an opinion refusing the motion of the Georgia executors for a decree, notwithstanding the answer of the New York administrator. That opinion is reported in —— Delaware Chancery —— ——, 2 Atl. (2d) 290.

By order of the Chancellor, dated June 29th, 1938, the New York Trust Company, as administrator, c.t.a., was made a party respondent in this cause. By stipulation of the parties, an order was entered on the same day permitting that company in its representative capacity to adopt the answer previously filed by it as temporary administrator, and permitting that answer to be amended in accordance with that stipulation.

In her will, Mrs. Hungerford bequeathed to her husband the sum of $5,000. in cash and certain jewelry which he had given her. The remainder of her estate, the amount of which did not appear, was bequeathed and devised to her mother and sister.

Under the law of Georgia, Mr. Hungerford could not secure any larger share of Mrs. Hungerford's estate by refusing to accept the provisions made for his benefit by her will. If, however, Mrs. Hungerford was domiciled in the State of New York at the time of her death, under the law of that State he could refuse to accept the provisions [fol. 500] made for his benefit by her will and would then be entitled to a one-half part of her personal estate.

The evidence, also, showed that O. Robert Hungerford, then of New York City, and Mrs. Julia M. Whitehead, then of Atlanta, Georgia, were married at Cambridge, Maryland, on the Twelfth day of June, 1932. They had a slight acquaintance in Florida some years before, when Mrs. Whitehead, then Julia Murphy, was a young girl. She later married C. P. Whitehead and they lived at Atlanta, but were subsequently divorced, and her close acquaintance with Hungerford, was apparently, renewed in May of 1932, a short time before their marriage. At that time they were apparently visiting mutual friends at their summer home near Cambridge.

Hungerford was a native of Watertown, New York, but was a bachelor and had lived at various hotels and apart-

ments in New York City since about the time he was 21 years of age. At the time of his marriage he lived in an apartment at the Sherry-Netherland Hotel, in New York City, which he rented on a monthly basis. He was not engaged in any gainful occupation at that time and apparently had no substantial source of income, as he had an admitted indebtedness of some $75,000. On the contrary, the then Mrs. Whitehead had considerable means and a substantial income, and owned a somewhat elaborate and expensive establishment in or near Atlanta, Georgia, designated as 509 West Paces Ferry Road, which had been built by her former husband and turned over to her in a separation agreement on their divorce.

Immediately after their marriage, the Hungerfords returned to New York City and apparently stayed three of four days at the Fairfax Hotel, where Mrs. Hungerford had been temporarily staying prior to her visit to Cambridge, Maryland. From New York City they went to a hotel in Atlantic City for a few days and registered as being from New York. From there, accompanied by friends, they went to a hotel at Virginia Beach, Virginia, [fol. 501] for a short stay, where they registered in the same manner, and then went to Atlanta, Georgia, where Mrs. Hungerford had always resided. While in New York, and about four days after his marriage, Mr. Hungerford gave up the apartment previously occupied by him at the Sherry-Netherland Hotel and never thereafter had any fixed place of abode in that city or state, though, usually accompanied by Mrs. Hungerford, he frequently went there and stayed at various hotels for varying periods of more or less short duration.

Mr. Hungerford testified that after their marriage, he and his wife agreed that they would travel for about two years, and that during that period he would not engage in any business occupation, and that Mrs. Hungerford said this was to be "a wedding gift to both of us because that is what I want to do." He, also, testified that shortly prior to their marriage he had been offered monetary backing in a business venture by a friend and wished to take advantage of it, but that Mrs. Hungerford opposed it because of her desire to travel. Pursuant to this plan, they decided to spend several months in Europe, and on June 25th, 1932, while in New York and just prior to going to Atlanta, they applied for the requisite passports. In the application they

were described as residents of New York City, and in fact made affidavits to that effect. They sailed for Europe on July 9th of that year, but for some days prior to that time they occupied the Atlanta house of Mrs. Hungerford at 509 West Paces Ferry Road. On leaving Atlanta, and prior to sailing for Europe they stayed a day or so at a New York hotel. They returned to America on November 8th, 1932, and were, therefore, gone about four months. On their return they stayed at the Waldorf Astoria in New York for about eleven days, or until November 19th of that year, and registered as "Mr. and Mrs. Robert Hungerford, 509 West Paces Ferry Road, Atlanta, Ga." While they were in Paris on, at least, one occasion they spoke of the house at 509 West Paces Ferry Road as their home, and [fol. 502] invited a relative of Mrs. Hungerford to send her son to visit them at that house. On November 19th, 1932 they left New York for Atlanta and opened and occupied Mrs. Hungerford's house, which during their absence had been in charge of a colored man, who was employed as chauffeur and butler, and had occupied that position prior to Mrs. Hungerford's second marriage. After their return to Atlanta, they not only continued to employ this man until he left in June of 1933, but had several other servants in the house. In fact, with one exception, they continued to employ the same servants so long as they continued to occupy the Atlanta house. In December of 1932, the Hungerfords motored to Florida with Mrs. Murphy, the mother of Mrs. Hungerford. They arrived at Miami on December 3rd and registered at the Biltmore Hotel in that city as "Mr. and Mrs. Robert Hungerford, 509 West Paces Ferry Road, Atlanta." After a short stay in Miami they returned to the Atlanta house of Mrs. Hungerford, and remained there until some time in February of 1933. A few days before Christmas of 1932, Mr. Hungerford went to New York and brought his mother, who still lived in Watertown, to Atlanta to spend the holidays. On that trip he registered at the Waldorf Astoria Hotel as "Mr. Robert Hungerford, West Paces Ferry Road, Atlanta, Ga." During his mother's stay in Atlanta, there were various social gatherings at the Hungerford house. In February of 1933, the Hungerfords again went to Florida and stayed there the remainder of the winter. While there, Mr. Hungerford joined the Surf Club at Miami Beach. His application was dated February 21st, and in it he stated "Home Address:

509 West Paces Ferry Road, Atlanta, Ga." In the same application under Club Connections he enumerated two clubs in Atlanta, Georgia, and a Tennis Club in New York. In April of 1933, Mr. and Mrs. Hungerford returned to Atlanta and occupied Mrs. Hungerford's house for about six months until some time in October of that year. On various occasions during that period they entertained num-
[fol. 503] erous guests, including old New York friends of Mr. Hungerford. In the Spring of 1933, after their return from Florida, they made certain improvements in the Atlanta house on Paces Ferry Road. One witness stated "In getting ready for one of those big parties * * * for the friends of Mr. and Mrs. Hungerford, the house was painted and * * * on the north-east side was torn out and rebuilt and on the extreme east-end of the house, the porch was torn out and rebuilt and screened; and also a lawn tennis court was placed on the terrace to face one of those porches". There was, also, other testimony to the same effect. There was then a swimming pool in the basement of the house under the kitchen and servants' quarters. One of the same witnesses also testified that Mr. Hungerford talked "about some plans he seemed to be drawing up for the house and ground and he spoke about an outdoor swimming pool". This statement by Mr. Hungerford was, apparently, made after their return from Florida in the Spring of 1933, or nearly a year after their marriage. From July 10th to July 22nd, 1933, the Hungerfords were registered at the Waldorf Astoria Hotel in New York as "Mr. and Mrs. Robert Hungerford, Atlanta, Ga." In the latter part of the same month, they made a short trip to Asheville, North Carolina, staying at the Grove Park Inn, where they registered as "Mr. and Mrs. Robert Hungerford, 509 West Paces Ferry Road, Atlanta". On their return from Asheville, in the latter part of July, they apparently went back to the Atlanta house of Mrs. Hungerford. On August 12th, 1933, Mrs. Hungerford had her will drawn in Atlanta and executed it there. It was headed "Georgia, Fulton County:" The next day she went to the Piedmont Hospital in Atlanta for an operation. The entry record signed by her at the time gave her address as "509 West Paces Ferry Road, Atlanta". She remained in the hospital about thirty days, and during a part of that time Mr. Hungerford stayed at the Atlanta house, which was kept open during the whole of this period, and the usual corps of servants remained

on duty. For some reason that does not appear, on August [fol. 504] 21st, however, Mr. Hungerford registered at the Henry Grady Hotel in Atlanta, "Name: Robert Hungerford, Street: 509 West Paces Ferry Road. City and State—City". On August 24th, 1933, he also, registered at the Atlanta Biltmore Hotel, giving the same address. In October of 1933, Mr. and Mrs. Hungerford went to Hot Springs, Virginia. Before leaving they paid the cook and the maid, informing them that they were going on a trip: Mrs. Hungerford personally paid the maid for several weeks in advance. At that time she said "When I come back I want you to come back and work for me". She, also, took the maid's telephone number. Mr. Hungerford personally paid the cook. At that time he not only told her that they were closing the house for a time and going on a trip but, also, said "If you are not working when we come back we want you when we come back." When they left on this trip the house was closed. They reached Hot Springs, Virginia, on October 12th, 1933, and registered at The Homestead, giving Atlanta as their address. From Hot Springs, Virginia, they went to New York City and registered at the Waldorf Astoria Hotel on November 16th as "Mr. and Mrs. Robert Hungerford, 509 West Paces Ferry Road, Atlanta, Ga." From New York they returned to Atlanta; the house being closed they registered at the Georgian Terrace Hotel in that city on December 24th as "Mr. and Mrs. Robert Hungerford, City". They remained in Atlanta over Christmas and until about the middle of January, 1934, and then went to Miami Beach, Florida, and registered at the Surf Club on January 18th. They were at the Surf Club at Miami from January 18th, 1934 until April 18th of that year. Mrs. Murphy, Mrs. Hungerford's mother, also spending the winter season at Miami, and had a serious stroke of paralysis in March of 1934. She was brought back to Atlanta in April of that year, and was accompanied by the Hungerfords and by Mrs. Riley, another daughter, and her husband, who also lived in Atlanta. Mrs. Murphy never fully recovered from this stroke and [fol. 505] the illness caused by it continued for many months. On their return from Florida, as a result of a family council, Mrs. Hungerford went to her mother's home on Peachtree Street to take charge of the house and her affairs. Mr. Hungerford accompanied her there, where

they both remained most of the time until at or about Mrs. Hungerford's death, some eighteen months later.

In July of 1934, the Hungerfords took a short trip to Asheville, North Carolina, and registered at Grove Park Inn on July 18th, 1934, as "Mr. and Mrs. Robert Hungerford, 509 West Paces Ferry Road, Atlanta." On March 31st, 1935 Mr. Hungerford went to an infirmary in Atlanta for an operation. At that time he gave his address as "1197 Peachtree Street". This was Mrs. Murphy's home address. At the same time under the heading Name and Residence of Relatives he inserted in the hospital record "Mrs. Julia Hungerford, Wife. Residence, 1197 Peachtree Street". In July of 1935, Mr. and Mrs. Hungerford went by airplane to New York City and registered at the Ritz Carlton Hotel on July 21st as "Mr. and Mrs. Robert Hungerford, 509 West Paces Ferry Road, Atlanta" From New York they went to Atlantic City and registered at the Ritz Carlton Hotel on July 26th, 1935 in the same manner. They remained in Atlantic City until September 5th. From there they went back to New York City and registered at the Langdon Hotel on that date as "Mr. and Mrs. Robert Hungerford, Atlanta, Georgia". On September 6th, 1935 they moved to the Madison Hotel, New York City, and registered as "Mr. and Mrs. Robert Hungerford, Home Address: Atlanta, Georgia".

When the Hungerfords left Atlanta on this trip Mrs. Murphy was still under the care of a nurse and they intended to be gone only about three weeks, but their return was delayed by the illness of Mrs. Hungerford. This first occurred while they were in Atlantic City but continued during the greater part of their subsequent stay in New [fol. 506] York. Hungerford stated that they used the Atlanta address of Mrs. Hungerford's house in registering at various hotels during practically the whole of their married life after their return from Europe in November of 1932 merely as a convenient mailing address, and pursuant to an understanding to that effect.

On September 5, 1935, while they were on their last trip to New York and Atlantic City, Mr. Hungerford wrote to Haskins & Sells, certified public accountants at Atlanta:

"Enclosed herewith are letters from U. S. Internal Revenue, also yours. Please notify proper parties that Mrs. Hungerford has been ill in New York and will return to Atlanta when well. At that time she will pay any tax

that is due the government. Kindly keep enclosed papers until our return at which time the matters will receive due attention."

Shortly after his marriage, Mr. Hungerford had organized the Trebor Securities Corporation, under the laws of Delaware, through certain New York attorneys. The purpose of its organization was to buy and sell securities. It had an authorized capital stock issue of $1,000; all of which was owned by Mrs. Hungerford, but Mr. Hungerford managed its affairs and had the sole authority to draw checks on its funds.

In August of 1935; while on the trip to New York and Atlantic —, Mr. Hungerford wrote Ernst & Ernst, of Atlanta,

"Will you please give enclosed matter your attention for me. You have had the Trebor Securities Corporation matter up for me with the Treasury Dept. and the corporation appears to be due a refund of $611.72. Will you see if you can have them mail me a check to 509 West Paces Ferry Road, Atlanta, or send same in care of your office?

[fol. 507] I can see no reason why Mrs. Hungerford's income tax matter should be mixed up with this corporation. In case Mrs. Hungerford owes the government any more for income taxes the matter will be taken up and given proper attention upon her return to Atlanta."

The evidence indicated that Mrs. Hungerford regarded the trip to Atlantic City and New York in the summer of 1935 as merely a pleasure trip. She told her personal maid, who remained in Atlanta, that she expected to be gone only about three weeks, and made arrangements for paying her and retaining her in her employ while she was gone. While in Atlantic City she wrote to the maid referring to the house on West Paces Ferry Road as "my home," and gave instructions for looking after the lawn. Mrs. Freeman, a friend of Mrs. Hungerford, testified that shortly after Mrs. Hungerford's return to Atlanta from this trip she stated that she was delighted to be back and "we will be here right along." While on the same trip, Mrs. Hungerford, also, wrote to her mother, referring to "the trip" and saying on one of the cards that she would be "home" soon.

During the time they were staying at the house of Mrs. Murphy, Mrs. Hungerford visited her house on Paces Ferry

Road almost daily, and on various occasions during that period used it for giving parties and entertaining friends. There is also evidence that they sometimes spent week-ends there. Mrs. Hungerford always spoke of that house as her home, stating that she had moved to her mother's house because she felt that someone should be there during her illness.

Hungerford wrote his mother "We will stay here (at the Murphy house) for awhile, as Julia has to run the house and take care of her mother's business matters. We are having five men work on the place on Paces Ferry, also housecleaning. I judge we may use it once in awhile. However, we are staying here for the present."

[fol. 508] On March 1st, 1935, Mr. Hungerford, in making tax returns to the Fulton County Georgia tax authorities for Mrs. Hungerford gave the Paces Ferry Road house as their address, stating that they were then staying with Mrs. Hungerford's mother on Peachtree Street, but were going to move back "to our Paces Ferry Road home by the time the tax notices will be mailed." Somewhat similar statements were made by him to the city tax authorities. Both Mr. and Mrs. Hungerford kept their personal effects, wearing apparel, etc., in the Atlanta house on Paces Ferry Road. On their return from Europe in 1932, Mr. Hungerford brought there a considerable amount of clothing which he had purchased abroad. He had a safe-deposit box in an Atlanta bank which he had rented in the name of Trebor Securities Corporation, but in which he kept his personal valuables, including what appeared to be certain old family jewelry.

The Hungerfords returned from their trip to Atlantic City and New York in October of 1935, and remained at the Home of Mrs. Murphy, the mother of Mrs. Hungerford, until the latter died on November 28th, 1935. She was buried in Atlanta.

In cross-examination, an employee of the firm of public accountants, who had prepared Mrs. Hungerford's tax returns for the years 1934 and 1935, testified:

"Q. In those conferences, you had with Mr. Hungerford through that year about the return, you understood from him he was a resident of New York?

A. That was our understanding.

Q. From him?

A. From him.

Q. And as far as Mrs. Hungerford confirmed the conferences you had with him that was what you understood from her?

[fol. 509] A. I don't know that that direct question was ever asked Mrs. Hungerford.

Q. Was she never there when you were discussing it with him?

A. She was there when we were discussing the 1934 return.

Q. And she took no exception to that?

A. She did not.

Q. That was the information you obtained from those conferences with her?

A. The conferences with her, it is my recollection, did not relate to that particular matter.

Q. Certainly from the conferences with him?

A. Yes.

Q. That he considered himself a citizen of New York?

A. That was the information as we understood it.

Q. Your best recollection is that he said he was a citizen of New York, isn't that what you mean?

A. The substance was he made his return in New York. Now as to whether he actually said he was a citizen of New York, I would not say he actually made that statement."

On February 5th, 1936, after Mr. Hungerford had gone to New York, in a letter to the Atlanta bank, in which he had a safe-deposit box, he referred to it "as my box which stands in the Trebor Securities Corporation name".

Mrs. Hungerford's bank account was always kept in an Atlanta bank.

[fol. 510] On March 13th, 1934, while she was in Miami, Florida, and before Mrs. Murphy's illness, she signed a card asking that her account be changed from the Whitehead to the Hungerford name. On that card she filled in as her "Residence address—509 W. Paces Ferry Road".

On March 3rd, 1934, while in Florida, Mr. Hungerford wrote the Commissioner of Internal Revenue, at Atlanta, Georgia.

"The corporation (Trebor Securities) sustained a substantial loss for the year ending December 31st, 1933, and consequently there will be no tax income. In view of the fact that I will be delayed in returning to Atlanta, where

the books of the corporation are kept, I respectfully request that the corporation be granted an extension of 60 days to May 15th, 1934, for the filing of its tax return".

On the same day, Mrs. Hungerford wrote the Commissioner of Internal Revenue, at Atlanta, Georgia,

"Due to the fact that I have been delayed in returning to Atlanta, where my records are kept, I respectfully request an extension of 60 days to May 15th, 1934 for the filing of my personal income tax return."

At the time of his marriage, Mr. Hungerford was a resident-member of the West Side Tennis Club, Forrest Hills, Long Island, and of the New York Athletic Club, New York City. On March 11th, 1933 he wrote the West Side Tennis Club,

"I wish to request that my membership shall be changed from resident to non-resident. My future address will be 509 West Paces Ferry Road, Atlanta, Georgia."

His membership was changed in accordance with this request. At the same time he wrote the New York Athletic [fol. 511] Club to the same effect, and his membership in that club was, also, changed to that of a non-resident. On January 17th, 1933 Mr. Hungerford applied for a non-resident membership in the Piedmont Driving Club, in Atlanta. In the application sheet he stated "Residence Address" Sherry-Netherland, New York. Business address: 101 Park Avenue". The Park Avenue number had been the business address of a Tile Company by which Mr. Hungerford had been at one time employed, but his connection with that company had been terminated some time prior to his marriage. On March 2nd, 1933, the Superintendent of the Piedmont Driving Club of Atlanta wrote Hungerford that he had been elected a non-resident member. That letter was addressed to him at 101 Park Avenue, New York City, and was returned undelivered. Mr. Hungerford was then in Florida. On April 18th, 1933, the Superintendent of the Driving Club again wrote Mr. Hungerford, addressing his letter to Mrs. Hungerford's house on West Paces Ferry Road, Atlanta, Georgia. In that letter he stated

"It has been brought to the attention of the Board of Directors of the Piedmont Driving Club that your residence has been lately transferred to the City of Atlanta . . .

If you desire to apply for a resident membership it is necessary that you file a new application for such membership."

On April 21st, 1933 the club again wrote Mr. Hungerford and addressed the letter to 509 West Paces Ferry Road

"as to the question whether your membership should be resident or non-resident we would appreciate your advising the club in regard to this matter so that the proper status of your membership can be ascertained."

On May 19th, 1933, Mr. Hungerford made application for a resident membership, and on June 14th, 1933 he was advised by letter sent to the house on West Paces Ferry Road

[fol. 512] "At a meeting of the Board of Directors held at the Club House on Tuesday, June 13th, your name was transferred from the non-resident to the resident list of members, this being in accordance with your request of May 19th, 1933".

Mr. Hungerford continued to be a resident member of that club, and paid dues accordingly. On January 18th, 1933 he applied for a non-resident membership in the Capital City Club in Atlanta, giving his business address as 101 Park Avenue, Residence New York. On November 7th, 1934, the Club wrote him

"At the meeting of the Governing Board on October 30th, your classification of membership was changed to that of a resident member, you having taken up a residence in the County".

From that date he continued to be a resident member of that club, and paid dues as such.

Mrs. Hungerford filed Federal income tax returns with the collector in Atlanta during each year of her married life. She, also, made her State income tax returns as a resident of Georgia. Under the law of that State, a person who maintains a place of abode there for more than six months in any one year must pay a State income tax for that year, but in the State returns in each case Mrs. Hungerford answered in the affirmative the question "Were you a resident of the State of Georgia December 31st" (referring to the year for which the return was made).

Under the law of Georgia, a person domiciled in that State was entitled to an exemption for income tax purposes of $3500., while other taxables were merely entitled to an exemption of $1000. Mrs. Hungerford claimed the $3500 exemption on her report. He Federal tax return for the year 1932 was made out by an Atlanta lawyer, but both her State and Federal returns for the years 1933 and 1934 were made out by Haskins & Sells, certified public accountants in Atlanta. Mr. Hungerford made the arrangements [fol. 513] with that firm and supervised the making of the returns. He gave them the number of the house on Paces Ferry Road as his address. He gave the same address in renting a safe-deposit box in the name of the Trebor Securities Corporation at the First National Bank at Atlanta, and in opening an account with certain Stock and Bond Brokers in that city. He used stationery with the name and address "Robert Hungerford, 509 West Paces Ferry Road, Atlanta, Georgia."

Mrs. Hungerford, at no time, made any tax returns to the State of New York, and Mr. Hungerford made no individual tax returns anywhere, for any year, after the year 1932, the year of his marriage. That return was filed in New York, and the fair inference from the testimony is that he had no taxable income after June 12th of that year, and his report merely covered income prior to that date.

On January 3rd, 1934 Mr. Hungerford wrote the New York attorneys who had organized the Trebor Securities Corporation

"As it is very doubtful that I will be in New York for a good many months, it seems that it would be for my own best interest to have the Trebor Securities Corporation tax returns made up herein Atlanta where I can give it the necessary time".

In the same letter he, also, requested that the books and records of the corporation be sent to certain specified public accountants in Atlanta, whom he had engaged to prepare the income tax returns for both the Trebor Securities Corporation and for Mrs. Hungerford. When he made that arrangement he gave his home as "509 West Paces Ferry Road, Atlanta, Ga." The bank account of the Trebor Securities Corporation was originally kept with the Chase National Bank in New York. When it was opened in December of 1932, the address then given by Mr. Hungerford

was "509 West Paces Ferry Road, Atlanta". A Packard [fol. 514] car, used by Mr. Hungerford, was purchased in the name of that corporation, and was licensed in the State of Georgia. The car used by Mrs. Hungerford was, also, licensed in that State. In July of 1932, shortly after his marriage, and while in Paris, Mr. Hungerford opened a bank account with the Chase National Bank in that city, and gave his address as the Sherry-Netherlands Hotel, New York City.

In the summer of 1933, for some reason that does not clearly appear, Hungerford contemplated taking legal steps to have his name changed. In June of that year an attorney of Watertown, New York, wrote him,

"I want to know whether you claim New York as your residence. Unless you are a resident of New York State I cannot change your name here. If you do claim New York City as your residence I would like to know whether it is a hotel and the address of the same. I can see no reason why you cannot claim that place as your residence, provided you have not voted in Atlanta".

On June 19th, 1933, in reply to this letter Hungerford wrote

"I regard New York City as my residence and claim the Sherry-Netherlands Hotel, 59th & Fifth Avenue, as my last residence".

As previously stated, he had given up his apartment in that hotel on June 16th, 1932. The lawyer to whom that letter was written was the Hungerford's family attorney in Watertown. On December 27th, 1933, Mr. Hungerford's mother executed a trust deed in which she made certain provisions for herself for life, with remainder to her son, and described him as being of New York City.

Whatever Mrs. Hungerford's attitude may have been, at some time during their stay at the house of Mrs. Murphy in 1934 or 1935 she made statements indicating that she wished her husband to engage in some business occupation. In 1935, when it was thought the Georgia Prohibition [fol. 515] Law was about to be repealed, Mr. Hungerford asked Mr. Glenn, President of an Atlanta Trust Company, to assist him in procuring the Georgia Agency for a large liquor manufacturing concern. Pursuant to his request,

Mr. Glenn dictated a letter in Mr. Hungerford's presence, and handed it to him. That letter was dated February 14th, 1935, and was addressed to a certain person, in care of National Distillers, 100 Broadway, New York. It stated:

"This letter will be handed you by Mr. Robert Hungerford, of this city, who wishes to talk to you about representing your company in Georgia, and I will be very obliged if you will grant him an interview".

There was, also, evidence to the effect that Hungerford had selected a warehouse in Atlanta to be used by him in case he procured the liquor agency. On the contrary, there was evidence to the effect that Mr. Hungerford was trying to procure this agency for a New York friend, and that Hungerford told him on the telephone that if the agency were procured he would have to come to Atlanta to manage the details as he did not intend to tie himself up in any business there.

A number of Hungerford's creditors threatened suits against him in Atlanta, and some were actually filed there. He engaged an attorney to represent him, requesting him to get the cases postponed. In at least one of these suits process was served by leaving a copy at 509 West Paces Ferry Road, Atlanta, on the theory that it was his place of residence. Some of these cases later came to trial but no evidence was introduced by Hungerford on the question of domicile. In connection with some of them, Mr. Hungerford's attorney wrote him on September 26th, 1933 "I told you I thought I could hold these cases off until October and this notice (of insistance on trial) is in line with what I expected". In the same letter, he, also, said "They con- [fol. 516] tend that you made application to the Piedmont Driving Club for a 'resident membership' ". In another letter to Mr. Hungerford, dated January 11th, 1934, his Atlanta attorney wrote

"As you know, it has now been about one year since I undertook in your behalf to get a delay in the suits filed here against you. I told you at the time I did not believe I would be able to defer actions on these matters longer than a year, or at the longest until the first part of the year. I have now been given notice that disposition will be made of them within the next few weeks. I think I have

been exceedingly fortunate in getting as much delay as I have".

In reply to a letter from this attorney, Mr. Hungerford, on February 21st, 1933, while in Florida, wrote:

"I am not a resident of the State of Georgia. My last residence was the Sherry-Netherlands, New York, and I have lived in New York for the last twenty-years".

His Atlanta attorney then prepared a plea to the jurisdiction, alleging that he was not a resident of Georgia. In connection with that plea, by letter dated February 28th, 1933, he wrote Hungerford:

"After we get the delay that the filing of this plea will afford you I will be glad to take up the matter of seeing what kind of adjustment I can get the other lawyers to make and it may be that I can get them to persuade their clients to settle for a small percentage of the amount involved".

A witness testified that while the Hungerfords were at the Fairfax Hotel in New York City, a few days after their marriage, Mrs. Hungerford telephoned to someone in Atlanta, Georgia. The same witness further testified "I think she was talking to a woman, and I heard her say something about selling her house and putting it on the market * * *. She said she wanted to sell the house". [fol. 517] Mrs. Hungerford had several rooms at the hotel, and this conversation probably took place in the bedroom. She was entertaining friends at the time, some of whom were in and out of the room during the telephone conversation. It did not appear that Hungerford was present at this time. While on the way to Virginia Beach, shortly after their marriage, and later on their way to Atlanta and still later while in Europe in 1932, Mrs. Hungerford seems to have considered and discussed with others from time to time either renting or purchasing, on the co-operative plan, an apartment in New York City. She, also, talked about selling her house in Atlanta. On being asked what the occasion was for talking about apartments, the witness answered "She was looking for an apartment". Mr. Hungerford, at times, was present during these conversations, but not always. The same witness testified that prior to

going to Europe, Mrs. Hungerford "went to Atlanta to sell her house". The witness, also, asked Mrs. Hungerford what she would do with her furniture in the Atlanta house, in case she sold it, to which she replied that she "hadn't made up her mind whether she would sell it furnished, or bring some of the furniture up to New York". But there was no evidence showing that she ever offered it for sale. While the Hungerfords were at the Waldorf-Astoria in New York City, after their return from Europe in November of 1932, the same witness testified "I asked her (Mrs. Hungerford) then if she had found an apartment, and she said 'no' ". Mr. Hungerford was present at this conversation. The same witness testified that whenever she saw the Hungerfords in New York they would stop at some hotel. She further testified: "Q. They had no residence here (meaning New York) did they? A. No, not then. Q. But they never did, did they? A. No, they hadn't definitely rented anything".

Some time during the year 1934, while the Hungerfords were staying at the house of Mrs. Murphy, in Atlanta, the wife of an intimate friend of Hungerfords, saw him in New York at a funeral, and was then told by him that he [fol. 518] and Mrs. Hungerford "were coming here (to New York) for a cooperative apartment". The witness tried to interest him in the purchase of her house at Spring Lake, New Jersey, but she was unable to do so, as he said "he wouldn't live anywhere but in New York", apparently meaning that he would not live in the vicinity of that city.

Another witness saw the Hungerfords at Taylor's Island, Maryland, either the same day or the day after their marriage. He said "they stated that their intention was to live in New York, New York City". The same witness, also, testified they both said "That they were probably going to sell the house in Atlanta, or close it up". He further testified "Q. Did they say anything about traveling? A. The day after they were married when I saw them in Maryland, the question was asked by one in the company what their intentions were and they stated that they intended to live in New York City, but for a year or two they were going to travel."

About a year after the marriage of the Hungerfords, and, therefore, some time in the year 1933, a friend of Hungerfords saw them at the Waldorf in New York City. She was interested in selling real estate and tried to sell

them a place on Long Island. But Mrs. Hungerford said "they were going to take a co-operative apartment in New York because she thought her husband didn't like the country well enough, and the only place he was happy was in New York". He was present during this conversation. Some time in or after the Fall of 1933, a witness who met the Hungerfords at a night-club in New York City testified: "Q. Do you recall any of them saying anything about their residence? A. He said he was still in New York. I asked him that and he said he was still living in New York. I hadn't met him for six or eight months before that time. He said he was still in New York". On being asked whether Mrs. Hungerford was present during this conversation the witness answered "Well she was practically there at the [fol. 519] table. I sat there for several hour. Q. The two of them were there? A. Yes."

Some six months after his visit with them in Atlanta, in the Spring of 1933, a New York friend of Hungerfords was told by Mrs. Hungerford that they were trying to sell the Atlanta house but had been unable to do so. While in New York in the Fall of 1935, Mr. Hungerford looked at apartments and when they left for Atlanta Mrs. Hungerford stated, in the presence of several persons, that they were going back there to see her mother, to collect their personal belongings and would return to New York to live in about two or three weeks. The same witness, also, testified that Mrs. Hungerford said they were going to spend the winter in New York. In the Fall of 1933 a witness testified that Mrs. Hungerford said they were coming to New York in the Spring to make that their home. A New York real estate agent, who testified before this Court in the Spring of 1939, stated that about five years before that time Hungerford had called him on the telephone and said he would either like to buy or rent an apartment. Mr. and Mrs. Hungerford were later shown various apartments by the witness. After a lapse of some time, Mrs. Hungerford wrote him that something had arisen that would take them away from the city for the time being, and that upon her return she would conclude the matter. At the time she was being shown apartments, Mrs. Hungerford said she had considerable furniture in her Atlanta house and that if she could sell the house and furniture she would do it, but if not she would move the furniture to New York. Hungerford was present at some of these conversations. All

of this occurred shortly after their return from Europe. The witness also testified that about two and one-half or three years later Hungerford telephoned him stating "that he and his wife were again desirous of finding some place" in New York and had been detained in the South by illness in his wife's family. He showed Mr. Hungerford various apartments. Mrs. Hungerford was ill at the time, and, [fol. 520] therefore, did not accompany them. No apartment was rented or bought in New York on either of the occasions above referred to. While in Florida in 1933, the proprietor of a lady's shop in Miami testified that Mrs. Hungerford said they were traveling a great deal, but that she was making her home in New York and intended to live there. There is, also, evidence that, though the house on Paces Ferry Road was shown to a prospective buyer while the Hungerfords were staying at the mother's house on Peachtree Street in 1934 or 1935, Mrs. Hungerford absolutely refused to sell it.

Robert H. Richards and Aaron Finger, of Richards, Layton and Finger, of Wilmington, and Dan MacDougald and James A. Branch, both of Atlanta, Georgia, for Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, deceased.

Clarence A. Southerland, of Ward and Gray, and Daniel O. Hastings, of Hastings, Stockly, Duffy & Layton, both of Wilmington, and John G. Wise of the New York Bar (Marion Smith, of Atlanta, Georgia, of counsel) for the New York Trust Company, Administrator c. t. a. of the estate of Julia M. Hungerford, deceased.

The Chancellor: This case is before this court on a Bill of Interpleader. Mrs. Hungerford died testate in Atlanta, Georgia, on November 28th, 1935 and, at the time of her death, owned, among other things, 1252 shares of the capital stock of the complainant company, which is a corporation of this State. Her will was dated August 12th, 1933, and, after her death, was duly probated in Fulton County, Georgia, and Letters Testamentary on her estate were granted in that County and State to Julian Riley and Hughes Spalding, the executors named in her will. The claim having been made that, at the time of Mrs. Hungerford's death, she was domiciled in the City of New York, on a subsequent date her will was, also, probated in that State, and letters of administration c. t. a. were granted to

the New York Trust Company, one of the defendants. Both the Georgia executors and the New York administrator [fol. 521] claim title to the stock in question and demand that new certificates be issued accordingly; and this bill was filed because of these conflicting claims.

Subject to certain exceptions that need not be considered, it is conceded that a personal representative appointed in the State in which the deceased person was domiciled at the time of her death has title to her personal estate, including shares of corporate stock issued by corporations of other States. Wilkins vs. Elliott, 9 Wall. 740; 21 Amer. Jur. P. 861, p. 854. The question to be determined, therefore, is whether, at the time of Mrs. Hungerford's death, she was domiciled in the State of Georgia, or in the City of New York. The executors of Mrs. Hungerford make two contentions:

1. That her will was finally probated, in solemn form, in Fulton County, Georgia, and, therefore, after legal notice to all parties interested in her estate, including Mr. Hungerford, her surviving husband; that, though she owned real estate in Georgia, the place of her domicile at the time of her death was an essential and material issue in that proceeding, and as the court found that she was then domiciled in Fulton County, Georgia, applying the principles of res adjudicata that question cannot be again litigated in this court, even though the New York administrator was not a party to the Georgia proceedings.

2. That, in any event, the facts proved show that on November 28th, 1935 both Hungerford and his wife were domiciled in Fulton County, Georgia.

The latter contention will be considered first, and in disposing of it certain general principles must be considered.

For most purposes the domicile of the husband fixes the domicile of the wife (In re Daggett's will (N. Y.) 174 N. E. 641; Porto Rico Ry. Light Co. v. Cognet, 3 Fed. (2d) 21; Beale Conf. Laws 198; 19 C. J. 414); and the claim that Mrs. Hungerford was domiciled in the City of New York [fol. 522] at the time of her death is based entirely on the contention that prior to their marriage on June 12th, 1932, Mr. Hungerford had long been a resident of that city and had never changed his legal domicile to Fulton County, Georgia.

When a man once acquires a domicile in a particular

place, that place remains his domicile until he acquires another (In re Estate of Dorrance, 115 N. J. Eq. 268; Texas v. Florida, 306 U. S. 398); and the burden of establishing that a change of domicile has taken place rests on the party asserting it. In re Estate of Dorrance, 115 N. J. Eq. 268; Texas v. Florida, 306 U. S. 398; State v. Frest, 4 Harr. 558. In order to effectuate a change of domicile, it is necessary that a person shall, in fact, remove from the old domicile to the new, with the intention of abandoning the old and of remaining permanently or indefinitely in the new. In re Estate of Dorrance, 115 N. J. Eq. 268; State vs. Frest, 4 Harr. 558; Dicey Conf. Laws (2d Ed.) 111.

In State vs. Frest, 4 Harrington 558, the Court of General Sessions aptly said:

"Domicil, or residence in the legal sense, is determined by the intention of the party. He cannot have two homes at the same time. When he acquires another he loses that home which he has exchanged for the new one. To effect this change, there must be both act and intention. 'Mere intention to acquire a new domicil, without the fact of removal, avails nothing; neither does the fact of removal without the intention.'"

In other words residence, in fact, coupled with the purpose to make that place one's home are the essential elements of domicile. Texas vs. Florida, 306 U. S. 398; State vs. Frest, 4 Harr. 558; 1 Beal Conf. Laws P. 15.2, p. 133.

No definite amount of time spent in a place is necessary to show an intent to make it a home; and if the fact of [fol. 523] residence and the intention to make the new place of abode concur, even for a moment, a change of domicile takes place. 1 Beale Conf. Laws, Section 15.2, 13.3, pp. 134, 126. That does not mean, however, that the length of residence is never to be considered in determining questions of domicile.

A man, by merely desiring to do so, cannot retain an old domicile when he gives up his old home and acquires a new one. 1 Beale Conf. Laws, Section 19.2, p. 149; In re Estate of Dorrance, 115 N. J. Eq. 268.

In 1 Beale's Conflict of Laws, Section 19.2, page 149, supra, the author points out:

"It is not enough that a man desires to acquire or keep a legal residence or legal domicile; the intention necessary for the acquistion of a domicile is the intention as to

the fact, not as to the legal consequences of the fact. 'A man's home is where he makes it, not where he would like to have it.' ".

An intention to abandon a former domicile may coexist with an indefinite or, as it is often called, a floating intention to return at some time to the abandoned domicile and again make a home there. Beale's Conf. Laws Section 18.2, p. 145; State vs. Frest, 4 Harr. 558; Gilbert vs. David, 235 U. S. 561; 19 C. J. 407; see, also, Texas vs. Florida, 306 U. S. 398.

As was said in State vs. Frest, supra, "It is not necessary that a man shall determine never to come back, either temporarily or permanently, in order to lose his residence. * * * 'If a person has actually removed to another place, with an intention of remaining there for an indefinite time, as a place of present domicile, it becomes his place of domicil, notwithstanding he may entertain a floating intention to return at some future period.' "

In other words, an intention to return to the former domicile, at a remote or indefinite period, will not control, [fol. 524] if other facts, which constitute domicile, give the new residence the character of a permanent home or place of abode. 19 C. J. 407, supra. A mere contingent intention to return to a former place of abode, therefore, will not prevent the acquisition of a new domicile. 19 C. J. 408.

A person's declarations are frequently important in ascertaining his intent, where questions of domicile are involved, but his conduct is the most important evidence of his intention to acquire a domicile in a particular place. Texas vs. Florida, 306 U. S. 398; 1 Beale Conf. Laws, Section 41 C, p. 253. If, therefore, there is a discrepancy between his declarations and his acts, his declared intention, if any, must yield to the conclusion fairly drawn from the facts and circumstances proved. Texas vs. Florida, 306 U. S. 398; 1 Beale Conf. Laws Section 41 C, p. 253. The very fact of actual residence in a place is a circumstance that tends to prove domicile in that place. 1 Beale Conf. Laws Section 41 C. 1, p. 254. If a man has a wife or a wife and family who reside in a particular place, in most cases that is also some evidence that he makes his home at the same place (1 Beale Conf. Laws, Sections 13.3, 41 C.3 pp. 126, 258); and the longer the occupancy the stronger the inferences to be drawn there-

from. All this, however, is prima facie evidence that may be rebutted by other pertinent facts and circumstances proved, but if a house in a particular place has been occupied and used for a considerable length of time by a husband and wife, as their pre-eminent headquarters, in the absence of any other circumstances indicating a contrary intent it is strong evidence that it is their home, both in point of fact and purpose. Texas vs. Florida, 306 U. S. 398.

As is pointed out in Restatement of Conflict of Laws, Section 13:

"A home is a dwelling-place of a person, distinguished from other dwelling-places of that person by the intimacy [fol. 525] of the relation between the person and the place. * * * In determining whether a dwelling-place is a person's home, consideration should be given to:

1. Its physical characteristics;

2. The time he spends therein;

3. The things he does therein;

4. The persons and things therein;

5. His mental attitude towards the place;

6. His intention when absent to return to the place;

7. Elements of other dwelling-places of the person concerned".

See, also, Texas vs. Florida, 306 U. S. 398.

When a husband and wife live together at the same place and the legal domicile of the husband is in issue, any acts or declarations of the wife, tending to show, whether or not they regard that place as their home, are pertinent facts and circumstances to be considered in determining the question of her husband's domicile. 1 Beale Conf. Laws, Section 41 B, p. 245; Porto Rico R. L. & P. Co. vs. Cognet, 3 Fed. (2d) 21.

The Hungerfords were married at Cambridge, Maryland while visiting friends near that place on June 12th, 1932. Mr. Hungerford then lived in an apartment in New York City, but never occupied it after his marriage. In fact, he gave it up on June 16th, 1932 and never thereafter had any fixed place of abode in that city or state,

nor did he have any occupation there at the time of his marriage, or at any time subsequent thereto. Prior to Mrs. Hungerford's trip to Cambridge, she had been stopping temporarily at a New York hotel, but then owned and occupied an elaborate house and grounds in or near Atlanta, Fulton County, Georgia. After their marriage, the Hungerfords returned to New York and stayed a few days at the hotel at which Mrs. Hungerford has been stop- [fol. 526] ping before she went to Cambridge. They then went on a short wedding trip to Atlantic City and Virginia Beach, and from there to Mrs. Hungerford's house at or near Atlanta, where they remained for some ten days. They then went to New York and, after staying a day or so in a hotel there, sailed for Europe early in July and remained there about four months. They returned from Europe in November of 1932 and after spending a few days in a New York hotel went to Mrs. Hungerford's Atlanta house. They arrived in Atlanta shortly after the middle of November and remained there a greater part of the time until February of 1933, when they went to Florida for the winter. During their absence the Atlanta house had been in charge of a caretaker who opened and aired it from time to time. He voluntarily left their employ in June of 1933, but testified that while he was employed there the house was always ready for occupancy on three hours' notice. On their return from Florida in the Spring of 1933, the Hungerfords again opened the Atlanta house, and, with the exception of occasional absences on trips to New York, Asheville, and perhaps elsewhere, occupied it with a full corps of servants until October of that year. In that month they closed the house and went to Hot Springs, Virginia for a short stay, and from there to a New York hotel for a little more than a month, but returned to Atlanta for Christmas. At that time they stopped at one of the hotels in that City because they intended to go to Florida in January of 1934. About the middle of January of that year they went to Florida. While there, in March of 1934, Mrs. Murphy, Mrs. Hungerford's mother, had a stroke of paralysis and, as a result of a family council, it was decided that Mrs. Hungerford should take charge of Mrs. Murphy's house in Atlanta and live there, at least, for the time being. Pursuant to this plan, the Hungerfords went to the Murphy house on Peachtree Street in April of 1934, and, with the

exception of absences on a few trips, remained there for about eighteen months, or until the death of Mrs. Hunger-
[fol. 527] ford in November of 1935. At that time, Mrs. Murphy was still living, but had been under the care of a nurse since she was first stricken with paralysis. During their stay at the Murphy house, Mr. and Mrs. Hungerford had ample living quarters for their own separate use, and Mrs. Hungerford even kept her personal maid. At least, after their return from Europe, it seems clear that they made Mrs. Hungerford's Atlanta house their real and pre-eminent headquarters until their temporary removal to the Murphy house in April of 1934. They were away on trips from time to time, but that was the place to which they always returned; and after they moved to Mrs. Murphy's house Mrs. Hungerford went to her house on Paces Ferry Road almost daily, and particularly in the latter part of her life frequently spoke of it as her home, and of her attachment for it. She, also, on occasions took friends out there for lunch, and there is some evidence that Mr. and Mrs. Hungerford sometimes spent week-ends there entertaining friends. Whatever the reason for their stay at the Murphy house may have been, it cannot be said that they did not make Atlanta their headquarters from April 1934 until November 28th, 1935, the date of Mrs. Hungerford's death. They were away on a trip in the late Summer or early Fall of 1935, which was materially extended by Mrs. Hungerford's illness, but returned to Atlanta as soon as she was able. While away on that trip, Mrs. Hungerford continued to pay her maid whom she had left in Atlanta, and on several occasions wrote about coming "home". When she returned she, also, stated that they would be in Atlanta right along.

The New York administrator claims that the evidence shows that the Hungerfords intended to close the Atlanta house permanently in October of 1933, but it does not clearly sustain that contention. It is true that both the cook and the maid were discharged at that time, but both Mr. and Mrs. Hungerford made statements to the effect that they were going away on a trip, and that when they returned
[fol. 528] they wanted them back. Mrs. Hungerford paid the maid and when she did so said "We are going away for a trip to New York. * * * Mr. Hungerford wants to close the house and dismiss all of the servants. I don't know why. When I come back I want you to come back

and work for me". In her testimony, the maid also added that Mrs. Hungerford took her 'phone number. Mr. Hungerford personally paid the cook. At that time he not only told her that they were closing the house for a time and going on a trip but also said "If you are not working when we come back we want you when we come back."

In the Spring of 1933, the Hungerfords entertained a number of guests at the house on West Paces Ferry Road, some of whom were old New York friends of Mr. Hungerford. Various entertainments from time to time for the Atlanta friends of Mrs. Hungerford were, also, given there. During the same period certain material changes and improvements were made in the house, and a tennis court was laid out. At that time there was a swimming pool in the basement of the house, under the kitchen and servants' quarters, and Mr. Hungerford seems to have made statements relating to plans for the construction of an outdoor swimming pool, which would naturally entail considerable expense; an expense which would hardly have been considered if he had not intended to make the Atlanta house his home. That house was occupied by the Hungerfords during the Christmas holidays of 1932, and at that time Mr. Hungerford went to New York and brought his mother to Atlanta to visit them.

On a few occasions shortly after their marriage, Mr. Hungerford registered their names at various hotels as being from New York, but after their return from Europe in November of 1932, in almost every case on their numerous stays at hotels, both in New York and elsewhere, he entered their names on the registers as residing at 509 [fol. 529] West Paces Ferry Road, Atlanta, Georgia. He gave the same address when he joined the Surf Club in Miami in 1933. He states that all of these registrations were due to an understanding between him and his wife that the Atlanta house should be used as a convenient mailing address when they were traveling, but he continued to make the same entries on the hotel registers on the last trip made by them in the late Summer or early Fall of 1935, though they had then moved to the house of Mrs. Hungerford's mother and had been living there for some time. In view of the fact that this practice was continued during the whole of their married life, after the first few weeks, Mr. Hungerford's explanation hardly seems satisfactory.

In March of 1933, Mr. Hungerford changed his resident-membership in two New York clubs to that of a non-resident member, giving his address as Atlanta. In 1933 and 1934, he became a resident member of two clubs in Atlanta. He first applied for non-resident membership in both of them, but, on their taking the position that he was a resident of Atlanta, he accepted membership on that basis and apparently continued to hold them in the same manner.

The only business activity that Mr. Hungerford had during his married life was the management of the affairs of the Trebor Securities Corporation, which was organized for the purpose of buying and selling securities. That corporation was organized shortly after his marriage, and its books and records were originally kept at a lawyer's office in New York City, but in June of 1934 he directed that they be sent to Atlanta, in order that the proper tax returns might be prepared there, stating that he did not expect to be in New York for many months. On its organization, that corporation had opened a bank account in the Chase National Bank in New York City, which account was opened in December of 1932, and Mr. Hungerford then gave the Atlanta house of Mrs. Hunger-[fol. 530] ford as his address. Mr. Hungerford's personal belongings, including, what was apparently, family jewelry and various stock certificates standing in his name were kept in Atlanta, and on his return from Europe in 1932 he brought to the Atlanta house a considerable amount of clothing purchased while on that trip. So far as appears, the only property belonging to him in the City of New York was a bag, a rug and a few paper packages left by him with a friend in that city shortly after his marriage.

In August of 1933, Mrs. Hungerford went to an Atlanta hospital for an operation and remained there about thirty days, giving the house on West Paces Ferry Road as her address. Prior to entering the hospital, she had her will drawn in Atlanta and executed it there on August 12th of that year. It was headed "Georgia, Fulton County;". The Atlanta house was kept open during her absence, and Mr. Hungerford stayed there a greater part of the time, though, for some unexplained reason, on two occasions he registered in Atlanta hotels, giving the house on West Paces Ferry Road, Atlanta, as his address. In

March of 1934, Hungerford, also, went to a hospital in Atlanta for an operation, and gave the Murphy house in Atlanta as his address.

Mr. Hungerford lived in New York until June of 1932, and apparently had no personal income requiring the filing of an income tax report after that time. He filed a tax report at the proper time in the State of New York for the year 1932, but naturally comprised income prior to the twelfth day of June of that year, and, therefore, has no bearing on this question. Mrs. Hungerford filed both State and Federal income tax reports for the years 1932, 1933 and 1934 in the City of Atlanta, and all of her books and records were kept there. She died on Thanksgiving Day of 1935, and therefore before the prescribed time for filing a report for that year. For the year 1932, these tax returns were made out for her by an Atlanta lawyer, whom she named as one of the executors of her estate. [fol. 531] Her returns for the years 1933 and 1934 were made by a firm of certified public accountants in Atlanta, who were employed by Mr. Hungerford, and under whose supervision they were prepared, and the clear inference from the facts is that he knew they were intended to be, and were, filed with the proper officers in Atlanta. Under the law of Georgia, a person who resides in that State for more than six months in any one year is required to pay an income tax. The exemption given such a person, is, however, much less than that allowed a person who is domiciled there. Mrs. Hungerford, in effect, not only stated in her State return that she was domiciled in Georgia, but claimed and deducted an exemption accordingly. The New York administrator claims that the record shows when the accountants were making out Mrs. Hungerford's tax reports, Mr. Hungerford stated that he was a resident of New York. There is some evidence from which that conclusion might be drawn, but in explanation of what he had previously said the witness further testified: "Q. Your best recollection is that he (Mr. Hungerford) said he was a citizen of New York, isn't that what you mean? A. The substance was he made his return to New York, now as to whether he actually said he was a citizen of New York I would not say he actually made that statement." Mr. Hungerford filed no individual tax report in the State of New York for the years 1933 and 1934, and, therefore, this statement could only have referred to the tax return filed

for the year 1932 for income received prior to June 12th of that year.

While in Georgia, both Mr. and Mrs. Hungerford used cars bearing Georgia license tags. The car used by Mr. Hungerford was purchased in the name of the Trebor Securities Corporation, which was a Delaware corporation, but it was, nevertheless, entirely used by him personally. He used stationery bearing the address of the house on West Paces Ferry Road, in Atlanta, belonging to Mrs. Hun- [fol. 532] gerford, and Mrs. Hungerford, also, kept her account in an Atlanta bank.

Mr. Hungerford stated that Mrs. Hungerford wished to travel for about two years after their marriage and did not want him to engage in any business occupation during that period. But, however that may be, while they were staying at the house of Mrs. Murphy, Mrs. Hungerford seems to have stated on various occasions that every man, including Mr. Hungerford, should have some occupation. The evidence indicates that Mr. Hungerford was, at least, interested in procuring a liquor agency in Georgia in the early part of 1935, but whether he intended to give it his entire personal attention, so that he would be required to spend all of his time in Georgia, is, however, disputed.

As I have already pointed out, the precise question to be determined is whether, on the death of Mrs. Hungerford, on November 28th, 1935, she was domiciled in Fulton County, Georgia, or in the City of New York. The answer to that question depends entirely on whether the evidence shows that after Mr. Hungerford's marriage he left New York and went to Atlanta, Georgia to live, with the then or subsequent intent to make that his home permanently, or, at least, for an indefinite period. The New York administrator contends that, particularly in view of the fact that the burden is on the Georgia executors to show that Mr. Hungerford had such an intent, no such conclusion can be fairly drawn from the evidence. It is not denied that the Hungerfords lived together as husband and wife from the date of their marriage on June 12th, 1932 until Mrs. Hungerford's death, or for a period of nearly three and one-half years. During practically the whole of their married life, prior to April of 1934, though they were away on frequent trips of varying duration, the house owned by Mrs. Hungerford in Atlanta was their real headquarters, and Mr. Hungerford had no place in the City of New York that

[fol. 533] he could call home. After April of 1934 they still made Atlanta their headquarters, but because of the illness of Mrs. Murphy they had moved temporarily to her house. It is true that both shortly after their marriage, and on repeated occasions thereafter, statements were made, particularly by Mrs. Hungerford, but sometimes by Mr. Hungerford, indicating an intent to sell or close the Atlanta house, and to ultimately rent or purchase an apartment in New York City. Either one, or both of them, looked at apartments in that city on at least two occasions. The first time in the Spring of 1933 and the last time in the early Fall of 1935, but there is nothing to indicate that Mr. Hungerford ever intended to return to New York to make that his home, without his wife. In fact, whether they procured an apartment there and made it their home depended entirely on whether Mrs. Hungerford was willing to take that step. The fair inference from the evidence is that in the early days of their married life, and perhaps prior to 1935, any contemplated removal to New York depended largely on what was to be done with the Atlanta house. This would seem to be indicated by the statement of Mrs. Hungerford in the Fall of 1933 that they had not been able to sell it. In the early Fall of 1935, Mr. Hungerford, also, stated to a New York real estate agent "that he and his wife were *again* desirous of finding some place" in New York.

Depending on the circumstances "a statement of future intention may be a well settled intention, soon to be acted on, or it may be a mere loose, speculative suggestion, not intended seriously." I Beale Conf Laws, Section 41 B, p. 246.

When considered as a whole, the evidence justifies the conclusion that long prior to November 28th, 1935, Mr. Hungerford, both in point of fact and purpose, had made Atlanta his home, and had intended to continue to make it his home certainly for an indefinite time; and any possible intent that he may have had to return to New York at [fol. 534] some t[illegible]e, depending, as it did, on the attitude of Mrs. Hungerford, was, therefore, a mere hope or wish of an indefinite, so so-called floating nature, that in no way affected his becoming legally domiciled in the State of Georgia. The preparation and filing of Mrs. Hungerford's income tax reports in the years 1933 and 1934, under his supervision, are inconsistent with any other conclusion.

Many other facts and circumstances, including the changes made in the Atlanta house and the contemplated outdoor swimming pool, justify the same conclusion.

As the facts show that Mrs. Hungerford, at the time of her death, was legally domiciled in Fulton County, Georgia, it is unnecessary for me to consider whether the New York administrator is bound by the judgment entered by the Georgia Court.

From the foregoing it necessarily follows that the executors named in Mrs. Hungerford's will are entitled to certificates for the shares of stock in controversy.

A decree will be entered in accordance with this opinion.

[fol. 535] IN THE CHANCERY COURT, NEW CASTLE COUNTY

TESTIMONY OF WITNESSES—Filed September 28, 1939

Testimony of Witnesses and proceedings at the final hearing in the above stated cause before the Chancellor of the State of Delaware, in the Court Room of the Court of Chancery, in the County Court House, in the City of Wilmington, on Wednesday, the Fifteenth day of March, A. D. 1939, at 10:30 o'clock in the forenoon.

Present: The Chancellor.

Robert H. Richards and Aaron Finger, Esquires, of the firm of Richards, Layton and Finger, and Dan MacDougald, and James A. Branch, Esquires, both of Atlanta, Georgia, for Julian Riley and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, deceased.

Clarence A. Southerland, Esquire, of the firm of Ward and Gray, Daniel O. Hastings, Esquire, of the firm of Hastings, Stockly and Duffy, and Marion Smith, Esquire of Atlanta, Georgia, solicitors for the New York Trust Company, administrator c. t. a. of the Estate of Julia M. Hungerford, deceased.

Mr. Finger: I desire to present Mr. James A. Branch and Mr. Robert Sams and Mr. Dan MacDougald, of Atlanta, Georgia. Mr. Branch and Mr. MacDougald have been previously admitted, and I desire to move the admission pro hac vice of Mr. Sams at this time.

The Chancellor: You are admitted pro hac vice, Mr. Sams.

Mr. Finger: If it please the court, this is an interpleader instituted by Coca-Cola International Corporation, a corporation of the State of Delaware, involving six hundred and twenty-six shares of common stock and six hundred [fol. 536] and twenty-six shares of Class A stock of that corporation, and the bill of interpleader was filed in this court after the executors of Julia M. Hungerford, deceased, who were in possession of the certificates evidencing the ownership of that stock had been qualified as such executors in the State of Georgia, and had made demand upon the Coca-Cola International Corporation for transfer of the stock to them.

There had been lodged with the Coca-Cola International Corporation an objection on behalf of a temporary administrator appointed in the State of New York, to the transfer of those shares of stock to the Georgia executors, who demanded transfer thereof to it, and by reason of that objection, the bill of interpleader was filed in this court.

There was no objection made to the filing of the bill of interpleader, and in due course an order was entered requiring the defendants to interplead, and the pertinent facts with which the Chancellor is concerned are unfolded by the pleadings which have been filed in pursuance of that order.

I shall, therefore, make a statement in opening our case by giving a description of the pleadings filed by the parties here.

The order of the Chancellor in directing the defendants to interplead, provided that the Georgia executors should file a plea in the nature of a bill of complaint, and I will, therefore, refer to that pleading as the bill, and will refer to the pleading filed on behalf of the administrator c. t. a. as the answer.

The bill alleges that after the death of Julia M. Hungerford, the owner of this stock in question, her will was probated in the State of Georgia, and the executors named in her will were duly qualified.

The will was first probated in what was known as "pro- [fol. 537] bated in common form," which is in the nature of an ex parte proceeding, and afterwards it was probated in what is known as "solemn form," which is after notice to all parties interested in succession in the estate of the decedent.

After the probate of the will in solemn form, a citation was issued and personal service had on all parties having any interest in the estate of Mrs. Hungerford, either under the will, or as if the testator had died intestate, and all parties concerned were before the court on personal service. Mr. Hungerford was served perso ally with the citation.

The Chancellor: He is the husband of the deceased?

Mr. Finger: Yes, Your Honor. He filed a caveat attacking the will, claiming testamentary incapacity of the decedent, and the issue of domicile of the defendant was raised by the pleadings, and notwithstanding his position in this case, there was a determination in that proceeding that the decedent was domiciled in Georgia and was capable of making a will.

Following that determination in the Court of Ordinary, an appeal was taken by Mr. Hungerford to the Superior Court of Fulton County. The proceedings which were before the Court of Ordinary having to do with matters of probate, before the Superior Court of Fulton County, the matter was heard de novo and testimony was taken on the question of testamentary capacity and on the question of domicile, and judgment was rendered in favor of sustaining the will, and the judgment of the Court of Ordinary in solemn form was affirmed.

From that judgment Mr. Hungerford sued out a writ of error to the Superior Court of Fulton County from the Supreme Court of the State of Georgia, and the decision of the Supreme Court held that the question of domicile [fol. 538] of the decedent was an issue, as well as the question of testamentary capacity, and the Supreme Court affirmed the judgment of the Superior Court of Fulton County.

In the meantime, and while those proceedings were pending in the State of Georgia, Mr. Hungerford went to New York and caused an application to be made, or made an application himself, to the Surrogate's Court for the appointment of a temporary administrator, on the theory that the decedent was a resident of the State of New York.

The Chancellor: Are the assets of the estate in New York?

Mr. Finger: No; the assets of the estate are not in the State of New York, and, so far as I know, there are no creditors of the decedent in the State of New York, and all of the assets of the estate are in the State of Georgia.

It is claimed in this proceeding here that the State of New York has a claim against the estate of Mrs. Hungerford for inheritance tax, but if the decedent was not domiciled in the State of New York, there would be no claim for inheritance tax, and there are no other creditors, so far as we know, in the State of New York.

A temporary administrator was appointed in the State of New York, and following that appointment a claim was lodged with the Coca-Cola International Corporation by the temporary administrator to this stock in question, and similar notices of claim to the right of stock were lodged not only with the Coca-Cola International Corporation, but as well with other corporations in which the decedent owned stock.

In view of the fact that Mr. Hungerford was a party to the proce-dings in Georgia, the executors filed a bill in equity there on the theory that the courts of Georgia had taken jurisdiction over the estate, and on that bill a restraining [fol. 539] order was issued restraining Mr. Hungerford from proceeding further with the proceeding in New York.

Then it was that the tax Commissioner of the State of New York, intervened in the New York proceedings, in the Surrogate's Court, and the temporary administrator was appointed; and after affirmation of the judgment of the Superior Court of Fulton County, Georgia, by the Supreme Court of that State, steps were taken to have the will probated in New York, and the New York Trust Company was thereupon appointed administrator c. t. a.

In the New York proceeding, other than Mr. Hungerford, no party in interest under the will, or parties in interest in succession, were personally served, and they did not appear. The New York proceedings were ex parte, and the only jurisdiction obtained by the Surrogate's Court of that State over the estate of Mrs. Hungerford was attempted to be secured by service by publication, or by other means of substituted service upon the parties in interest.

The Chancellor: The other side contends that Mrs. Hungerford was a resident of New York?

Mr. Southerland: Yes, Your Honor; and we expect to prove it.

Mr. Finger: That is the theory on which the proceedings were instituted in New York.

The answer filed in this case by the temporary administrator, which by adoption became the answer of the administrator c. t. a., sets up the contention that Mrs. Hungerford was domiciled in New York, and the contention is made that the domiciliary administrator is entitled to the estate and should receive and administer the assets belonging to it, including the stock in question here.

Considering the matter was one which might be deter- [fol. 540] mined on motion for decree notwithstanding the answer, such a motion was filed by us and argued. The theory on which that motion was filed was, that in view of the proceedings in Georgia, they were proceedings in which all the parties who, under the circumstances, would have been interested in the estate of Mrs. Hungerford, either under the will, or under the intestacy laws of the State of Georgia, and all of the questions involved in this proceeding were deemed by us to have been litigated in that proceeding in Georgia. There was no one else interested in the estate at any time prior who could have been affected at the time of the litigation in Georgia, and we felt that the judgment of the Georgia Court is entitled to full faith and credit, and there was no way by which it could be attacked. We felt that an attempt to prove the domicile of Mrs. Hungerford to be in the State of New York would be improper.

In other words, to attempt to prove that she was domiciled in New York would be immaterial, because it deals, in effect, with litigation of a legal conclusion, and the evidence would not be admissible.

All of the parties interested in succession having had their day in court, evidence to prove the domicile would be precluded; and there is no doubt but what all of the parties in interest in succession in the estate of Mrs. Hungerford, have had their day in court, and there has been an adjudication of the question of domicile as being in the State of Georgia.

At the time the motion for a decree notwithstanding the answer was made, an administrator had not been appointed in New York. All there was, was a temporary administrator, whose position would have been questionable; and after the appointment of the administrator c. t. a., that fact was brought to the attention of the Chancellor; but, as I say, it was brought to the attention of the Chancellor after the motion for a decree notwithstanding the answer was filed. [fol. 541] The Chancellor denied that motion upon the

theory that where a motion is made under Rule 44 of this court for a decree notwithstanding an answer, it is discretionary whether such a motion will be granted, and he decided that he would exercise his discretion not to dispose of this case on that motion.

The Chancellor: Such a motion is, in effect, a demurrer to the answer.

Mr. Finger: That is correct; and then the Chancellor proceeded to say that since the administrator c. t. a. was appointed, and the interest of the temporary administrator was gone, on such a motion all of the allegations of the answer are taken as true, and, because the allegations of the answer with respect to the domicile of Mrs. Hungerford by the administrator c. t. a., as being in the State of New York, would be taken as true, the Chancellor was unwilling to make a decree.

The vital point, however, was not touched upon in the opinion of the Chancellor. In other words, there was not a word in the Chancellor's opinion which passes upon the question of whether full faith and credit would not be given to the Georgia judgment. That question was not passed upon, and Your Honor will have to pass upon it.

We take a twofold position. First, that the Georgia judgment is conclusive on the question of domicile, that everybody interested in succession in the estate having had their day in court, and having been heard, there can be no issue of domicile before this court.

Our second position is, that our testimony discloses that Julia M. Hungerford was domiciled in Georgia, although we shall object to the admission of any testimony here on the question of domicile, most of which has been taken on depositions. But I assume Your Honor will follow the usual practice and receive the testimony subject to our objection, [fol. 542] and that admissibility of such testimony may be argued later.

The Chancellor: Yes; I think it would be better to consider the question of admissibility of the testimony later.

Mr. Finger: Yes; and Your Honor will receive the testimony subject to our objection, and consider it after full argument.

The Chancellor: I think that is a better way.

Mr. Finger: Since the testimony will be received by Your

Honor, perhaps I should say a brief word concerning our testimony on this question.

A large part of our testimony is contained in exemplified copies of the Georgia proceedings. That evidence will be supplemented by testimony taken on deposition, and further testimony which we shall present before Your Honor here.

In general, our testimony shows the following:

That Mrs. Hungerford, who died November 28th, 1935, was born and reared in Atlanta, and lived there all of her life. At the time of her marriage to Mr. Hungerford, she was a woman of substantial means, and was the owner of a large home, which was sumptuously furnished, in which she entertained extensively before her marriage and also entertained extensively after her marriage to Mr. Hungerford.

Mr. Hungerford, at the time of his marriage to Mrs. Hungerford, was without means, or occupation, and I believe our testimony will show that he was in fact in debt.

After the marriage, Mr. and Mrs. Hungerford went to this home in Atlanta to live, and Mr. Hungerford had no other place of residence from the time of their marriage until after the death of Mrs. Hungerford.

[fol. 543] The Chancellor: Was he a resident of Georgia at the time of their marriage?

Mr. Finger: He had been, I believe, a resident of the State of New York prior to his marriage to Mrs. Hungerford, but he had no fixed place of abode, so far as the testimony and evidence taken discloses, except that he lived in the State of New York.

After his marriage to Mrs. Hungerford, such personal belongings as he had were taken to this home in Atlanta, or near Atlanta, and he occupied it, or the home of Mrs. Hungerford's mother, Mrs. Murphy, until Mrs. Hungerford's death, and he never maintained a home, or room, or kept his personal effects anywhere else during that time.

Mrs. Hungerford, as a young girl, had been accustomed to traveling, and had made many extended trips, as she did after her marriage to Mr. Hungerford, but after her marriage to Mr. Hungerford she kept all of her belongings and personal effects in this home, except that she would take whatever things she needed when she went on trips, and Mr. Hungerford would likewise take whatever things he needed for the trip, but whatever remained of their belongings, remained in this home.

After the marriage of Mr. and Mrs. Hungerford, they entertained their friends at that home, not only friends in Atlanta, but also entertained friends of Mr. Hungerford, in this home; and after their marriage Mr. Hungerford brought his mother to that home, and there was considerable entertaining there in her honor.

Our testimony shows conclusively that this was the only home that Mr. and Mrs. Hungerford had from the time of their marriage until the time of Mrs. Hungerford's death.

There is a considerable amount of testimony—I should not and will not describe it in detail—going to show that [fol. 544] this was not only the home of Mr. and Mrs. Hungerford after their marriage, but that everything done by them was significant of the intention on part of Julia M. Hungerford, and also on the part of Mr. Hungerford, to regard that as their home and domicile.

Within the past two or three days, Your Honor has doubtless seen the decision of the Supreme Court in the case of Colonel Green on this question of domicile, and, if so, under the ruling in that case, we believe that when the testimony is in in this case, that Your Honor will feel that the domicile of Mrs. Hungerford is established without a doubt, and, if it should be deemed by Your Honor that the question of domicile is an issue here, that it should be found that Atlanta was the domicile of the decedent.

I want to conclude my statement by pointing out that the vital issue in this case is the question of title to stock of the Coca-Cola International Corporation.

The Chancellor: You represent whom?

Mr. Finger: We represent the executors under the will of Julia M. Hungerford, who were appointed and qualified in the State of Georgia, and we contend that those executors have title to the stock in question, and that it passed to them as of the date of the death of the decedent, or when they were qualified and letters testamentary were granted to them; and that all questions pertaining to the title to that stock have been settled irrevocably and finally by the Georgia proceedings by virtue of the fact that all persons interested in the estate in succession were in court, and the questions were fully determined.

We contend that the question of domicile and the question of title having been determined, no court in any other State can pass upon those questions and give full faith and

credit to the Georgia proceedings, as is required under the Federal Constitution.

[fol. 545] It has been suggested by Mr. MacDougald that with respect to the person representing the administrator c. t. a., he himself appeared in the Georgia proceedings was served personally, and represented the persons in succession, and by law those persons are concluded by the Georgia proceedings.

He can't be said fit to represent creditors, because there is no question here about them. They can only be interested by reason of having a claim against the estate, and if Your Honor should go into the question of domicile, and whatever way you might determine it, it is conclusive on all creditors who could possibly have an interest here, namely, the State of New York, in whose behalf the Tax Commissioner of that State intervened in the New York proceedings, claiming the decedent to be indebted to it for income tax, and the State of Georgia for income tax; so, in whatever manner Your Honor may determine this case, the question of creditors can't enter into it, and that fact indicated the futility of such a question being raised here.

Mr. Southerland: I should like to open our case at this time. There are two issues in this case, as we see it. The first question is an issue of law, namely, the effect to be given to the proceedings in Georgia, as outlined by Mr. Finger, though he erroneously, or inadvertently, stated that all of the assets of the estate of Mrs. Hungerford are in Georgia.

It is true that the certificates evidencing the ownership of the stock of the Coca-Cola International Corporation were in Georgia at the time of Mrs. Hungerford's death, but they were not endorsed in blank, and, for administration purposes, the stock of that corporation was in the domicile of the corporation.

May I also state that there was no question of domicile at issue in the Georgia proceedings. The executors con-

[fol. 546] tend, and the Supreme Court of Georgia held, with the Chief Justice dissenting, that there was an issue on that question involved in those proceedings in Georgia, but when the evidence in this case is in, I feel that Your Honor will feel that the evidence here is sufficient to refute that contention.

There is a question of law here, namely, whether when a trial has been had and judgment rendered in a State in which

a question has not been raised—where a question of domicile has not been raised—is that judgment binding upon the world, and does it preclude the question of domicile being raised in another jurisdiction, or can another State raise the question of domicile, as to which the other State claims the decedent to be a resident of? The cases hold they can.

The Chancellor: In what type of cases—under special circumstances, or is that a general proposition?

Mr. Southerland: Generally, where there is a question as to who shall administer the assets of a decedent.

The law is settled that the domiciliary administrator of a decedent is entitled to administer the personal effects and property, but where assets of a decedent is found in another State, it is the duty of the court of that State to remit those assets to the domiciliary jurisdiction, and that is the principle of law we seek to invoke here.

The principal thing I want to call Your Honor's attention to is, that this question has already been adjudicated by Chancellor Wolcott; but, of course, Your Honor has the right to review the matter, but Chancellor Wolcott's opinion applied that principle.

The Chancellor: Is that question involved here?

[fol. 547] Mr. Finger: No; we don't dispute that principle, but we don't feel that Chancellor Wolcott passed upon it.

Mr. Southerland: I understood Mr. Finger to say he wanted to re-argue the question.

Mr. Finger: No: I don't question the duty to remit the assets to the domiciliary jurisdiction.

Mr. Southerland: I understood that you want to re-argue that the judgment was binding on the world, and, therefore, precludes the raising of the question of domicile.

Mr. Finger: My statement was that my objection is, whether any evidence on the question of domicile is admissible here.

Mr. Southerland: I guess I haven't understood your contention, and took your statement another way.

At any rate, Your Honor, all of these contentions which Mr. Finger has stated, namely, who has title to the stock, and whether the world is concluded by the Georgia judgment, were presented to Chancellor Wolcott and resolved against Mr. Finger;

Mr. Richards: We consider that they were not decided,

not attempted to be decided, and that they were not discussed before Chancellor Wolcott.

Mr. Southerland: I will read what Chancellor Wolcott had to say (Mr. Southerland read from the opinion of Chancellor Wolcott heretofore filed in this cause in disposing of the motion for a decree notwithstanding the answer, as follows):

"The Georgia executors insist, however, that the question of domicile was formally adjudicated in Georgia as being in that State, in proceedings to which all the heirs at [fol. 548] law were parties, and that under the full faith and credit clause of the constitution of the United States and the act of congress passed in pursuance thereof, such judgment is conclusive of the fact, even against the admitted truth to the contrary. Full faith and credit are to be sure, to be given to the Georgia judgment. Like faith and credit are also to be given to the New York judgment which adjudges the domicile to have been in New York. But the judgment in each case is to be given effect only to the extent jurisdiction existed to render it. The full faith and credit clause does not preclude an inquiry into the jurisdiction of the court in which the judgment is rendered, over the subject matter, or the parties affected by it, or into the facts necessary to give such jurisdiction."

In other words, the question of domicile is open for Your Honor's determination.

Your Honor understands that proceedings were instituted in the State of New York similar to those instituted in the State of Georgia, for the probate of Mrs. Hungerford's will, and they were similar in every respect to the Georgia proceedings, except that in the New York proceedings all of the persons interested in the estate were not personally served, but the administrator c. t. a. was appointed after elaborate hearings were held by the Surrogate.

The New York proceedings were not ex parte proceedings at all. Citations were served in those proceedings in accordance with the provisions of the New York law, and that service was adequate for a judgment in rem, and the Surrogate found, as I say, after elaborate hearings that Mrs. Julia M. Hungerford was domiciled in the State of New York.

It is our contention that the law governing this case was passed upon by the Chancellor Wolcott, and that the law as

laid down by him is the law in the case; but I don't say [fol. 549] Your Honor has not the power to re-open the case and determine the matter.

It is also our contention that the only question of fact here for determination, is the question of domicile. The facts brought out by the depositions show that Mrs. Hungerford was a resident of the State of New York. There is no dispute about the fact that upon marriage, the wife takes the domicile of the husband, and there is no dispute about the fact that at the time of the marriage of Mr. and Mrs. Hungerford, Mr. Hungerford was domiciled in the State of New York, and after the marriage they were both domiciled in the State of New York.

The Chancellor: Isn't that a question of fact?

Mr. Southerland: Yes; that is a question of fact, but at the moment of their marriage, Mr. Hungerford being domiciled in the State of New York, he continued to be domiciled there, and that became the domicile of Mrs. Hungerford, unless Mr. Hungerford changed his domicile to the State of Georgia, or unless they show that he removed to the State of Georgia with the intent of establishing a domicile there.

The facts are that right after their marriage, they went back to New York, and before going on a honeymoon trip they paid a short visit to Georgia for the purpose of enabling Mrs. Hungerford to clean up some of her business affairs, and thereafter made a visit to Hot Springs and Virginia Beach, and possibly Atlantic City, and later on they made a visit to Miami Beach.

In the Spring of 1934, while they were at Miami Beach, Mrs. Hungerford's mother, Mrs. Murphy, suffered a stroke, and they had to take her back to Atlanta, and for a period of sixteen or eighteen months Mr. and Mrs. Hungerford stayed on at the home of Mrs. Murphy, at 1193 Peachtree Street, and they stayed there in order to assist in running the house for Mrs. Murphy.

[fol. 550] At least twice during the period from June, 1932, up to the time that Mrs. Murphy had the stroke in 1934, at least on two occasions, they went to New York for the purpose of engaging an apartment in New York, and I think Your Honor will conclude that the only reason they didn't move to New York was because of Mrs. Murphy's illness.

During this period there were several occasions on which Mr. Hungerford had to make solemn declarations as to

his domicile, on each of which occasions he declared his domicile to be in the State of New York; and I don't think it can be questioned that if a person once acquires a domicile, there is no question but that it remains as his domicile, unless he makes a change, or does some act that would indicate a change of domicile.

During this period there were two suits filed against Mr. Hungerford in Atlanta, and service in those suits was had by leaving a subpoena, according to the Sheriff's return, at his usual place of abode. In both instances Mr. Hungerford filed a solemn declaration setting up the State of New York as his place of abode.

Upon his mother's death, Mr. John C. Purcell, a lawyer in New York, wrote to Mr. Hungerford to inquire with respect to his domicile, and in reply Mr. Hungerford wrote a letter stating that his domicile was in New York; and when Mr. and Mrs. Hungerford left for Europe about a month after their marriage, they made a passport declaration in which they recited themselves to be domiciled in the State of New York.

Therefore, we say, and I shall not take any more time discussing the proof in greater detail; but we contend that immediately after the marriage of Mr. and Mrs. Hungerford they were domiciled in the State of New York, and that there is nothing in the record in this case to show a change of domicile, or to show an attempt to have a different domicile than in the State of New York.

[fol. 551] Senator Hastings has called to my attention that after their marriage, Mr. and Mrs. Hungerford made arrangements for mail to be delivered to the Paces Ferry Road home in Atlanta during their absence on trips, and gave that address on a number of occasions when they were in New York looking for apartments. On those occasions they would give their forwarding address as Paces Ferry Road, Atlanta.

Mr. Finger: Mr. MacDougald has asked me to inquire of counsel on the other side as to what assets of Mrs. Hungerford are in the State of New York.

Mr. Southerland: There is stock of Consolidated Oil Company, a promissory note for fifty-five hundred dollars——

Mr. Finger: The Consolidated Oil Company, we understand is a New York corporation.

Mr. Southerland: And stock of the Texas Corporation.

Mr. Finger: The Texas Corporation is not a New York Corporation.

The Chancellor: You mean that the note and stock in certain New York corporations constitute the assets of Mrs. Hungerford in New York?

Mr. Southerland: Yes; the rights to which were secured by the administrator c. t. a., and also a promissory note for fifty-five hundred dollars in favor of Mrs. Hungerford, which was executed by a resident of New York.

Mr. Finger: Is that note of any value?

Mr. Southerland: It is a promissory note on which the administrator c. t. a. brought suit and then abandoned it.

Mr. Southerland: It is my recollection that there was a [fol. 552] dividend paid on this stock of Coca-Cola International Corporation that was paid over to the administrator c. t. a., but their right to that dividend was attacked.

Mr. Finger: The Guaranty Trust Company, of New York, is paying agent for the Coca-Cola International Corporation, and dividends on that stock were transmitted to New York, and held by the Guaranty Trust Company, and disbursed by the Guaranty Trust Company, and they were paid over to the administrator c. t. a., and we had to apply to the Surrogate's Court to have them sent back.

I think the assets have been sufficiently identified.

Mr. Southerland: I referred to what I termed a trivial inaccuracy in Mr. Finger's opening statement, but I don't want to take up the time with respect to that now. I don't think it will make any difference.

The Chancellor: I wouldn't think it necessary, and I am not sure that it would make any difference with respect to the issues here.

Mr. Finger: I desire to offer in evidence an exemplified copy of the proceedings in the Court of Ordinary of Fulton County, State of Georgia, in the matter of the estate of Julia M. Hungerford, deceased, which has been adopted as Exhibit A to the bill of complaint.

The Chancellor: Is there any objection?

Mr. Southerland: Yes; Your Honor. We object to them first, on the ground they are immaterial. We don't object on the ground that they are copies. They are papers which are attached to the pleadings in the case and admitted by the answer, but we object on the ground they are immaterial, and on the second ground that Chancellor Wolcott has

laid down the law in this matter, and his decision is now the law of the case.

[fol. 553] The Chancellor: I will admit them subject to the right to argue the admissibility of the papers at the final argument.

Mr. Southerland: Your Honor will save us an exception for the purpose of reserving the question of law?

The Chancellor: Yes; you may note an exception.

(Whereupon an exception to the Chancellor's ruling is noted on behalf of the defendant, New York Trust Company, administrator c. t. a.)

Mr. Richards: We propose to offer all of the exhibits attached to the bill, and the amended bill, appearing as exhibits A to G, inclusive, and I suppose you will want to object to their admission on the same ground, and reserve the matter for the later discussion and determination?

Mr. Southerland: Yes.

(The exemplified copy of the proceedings in the Court of Ordinary, Fulton County, State of Georgia, in re Estate of Julia M. Hungerford, deceased, was marked "Complainant's Exhibit No. 1.")

Mr. Finger: I offer in evidence an exemplified copy of the proceedings on appeal from the Court of Ordinary to the Superior Court of Fulton County, State of Georgia.

The Chancellor: They are admitted under the same conditions.

(The exemplified copy of the proceedings in the Superior Court, of Fulton County, State of Georgia, in re Estate of Julia M. Hungerford, deceased, was marked "Complainant's Exhibit No. 2.")

[fol. 554] Mr. Finger: I offer in evidence an exemplified copy of the proceedings in the Superior Court of Fulton County, Georgia, in re will of Julia M. Hungerford, Hughes Spalding and Julian Riley, propounders, vs. O. Robert Hungerford, caveator, an appeal from the Court of Ordinary of Fulton County, Georgia, which is attached to the bill as "Exhibit C."

The Chancellor: It is admitted, under the same conditions.

(The exemplified copy of the proceedings in the Superior Court of Fulton County, Georgia, No. 110,062, in re will

of Julia M. Hungerford, Hughes Spalding and Julian Riley, propounders vs. O. Robert Hungerford, caveator, was marked "Complainant's Exhibit No. —.")

Mr. Finger: I offer in evidence an exemplified copy of the bill of complaint and the orders entered thereon in the Superior Court of Fulton County, Georgia, for an injunction against the prosecution of the application filed by him in the Surrogate's Court in the State of New York, which is attached to the bill as "Exhibit D."

The Chancellor: It is admitted under the same conditions.

(The certified copy of the proceedings in the Superior Court of Fulton County, Georgia, on the application of Hughes Spalding and Julian Riley, as executors of the last will and testament of Julia M. Hungerford, deceased, in aid of and supplement to and ancillary to the domiciliary administration of the estate of Mrs. Julia M. Hungerford, deceased, was marked "Complainant's Exhibit No. 4.")

Mr. Finger: I offer in evidence the bill of exceptions pendente lite and motion for a new trial and other matters set forth in the papers attached as Exhibit E to the amended bill of complaint.

[fol. 555] The Chancellor: It is admitted under the same conditions.

(The certified copy of the bill of exceptions pendente lite, etc., in the case of Hughes Spalding and Julian Riley as executors and propounders of the will of Julia M. Hungerford vs. O. Robert Hungerford, caveator, in the Superior Court of Fulton County, Georgia, was marked "Complainant's Exhibit No. 5.")

Mr. Finger: I offer in evidence a copy of the decision of the Supreme Court of the State of Georgia, which is attached as "Exhibit F" to the amended bill, the accuracy of which is admitted in the answer.

Mr. Southerland: That includes the dissenting opinion of the Chief Justice?

Mr. Finger: Yes.

The Chancellor: It is admitted under the same conditions.

(The copy of the decision of the Supreme Court of the State of Georgia in the Case of Hungerford vs. Spalding, et al., executors was marked "Complainant's Exhibit No. 6.")

Mr. Finger: I offer in evidence the final remitter of the Supreme Court of the State of Georgia in the case of Robert Hungerford v. Hughes Spalding, et al., executors, which is attached as "Exhibit G" to the amended bill.

The Chancellor: It is admitted under the same conditions.

(The final remitter of the Supreme Court of the State of Georgia in the case of Robert Hungerford v. Hughes Spalding, et al., executors, was marked "Complainant's Exhibit No. 7.")

[fols. 556-680] Mr. Finger: Now, if the court please, from the viewpoint that the documents which we have just had admitted in evidence are conclusive of the right of the executors of Julia M. Hungerford to the title to the stock in question, and are entitled to have the stock turned over to them, and if that matter were to be passed on at this time, we should rest at this point. If there could be some indication as to how far we should proceed, and without prejudice to that position, we feel that we should proceed to present evidence on the question of domicile, and that will be presented by Mr. Branch.

[fol. 681] JOHN GASTON, a witness for and on behalf of the administrator c.t.a., the defendant, being produced, sworn and examined, testified as follows:

Direct examination.

By Mr. Southerland:

Q. Mr. Gaston, you live at 277 Park Avenue?
A. Yes.
Q. New York City?
A. Yes.
Q. You were born in Massachusetts?
A. Yes.
Q. And came to New York in 1923?
A. Yes.
Q. And have since resided there?
A. Yes.
Q. And had your business there?
A. Yes.
Q. You are a member of what firm?

A. Mackey, Gaston and Page.

Q. And that firm is engaged in business in New York City?

A. Yes.

Q. You are a director of Drury, Erwell & Company?

A. Yes.

Q. And you were formerly a director of some Boston banks?

[fol. 682] A. Yes.

Q. Do you know Mr. Robert Hungerford?

A. Yes, sir.

Q. How long have you known him?

A. About seventeen years. Ever since he has lived in New York City.

Q. Have you known him in a business way and a social way?

A. Yes.

Q. You have been quite friendly with him?

A. Yes.

Q. Do you know that he lived at Watertown, New York?

A. I do.

Q. And is a member of a substantial and reputable family in that part of New York State?

A. Yes.

Q. The testimony here in this case is that Mr. Hungerford and Mrs. Whitehead were married during the month of June, 1932. Do you remember reading of that marriage in the newspapers?

A. I do.

Q. After their marriage, did you see Mr. and Mrs. Hungerford in New York.

A. Yes; two or three days after their wedding, I saw them, when they came to New York.

Q. And then you met Mrs. Hungerford for the first time?

A. Yes.

Q. Were you one of the guests of Mr. and Mrs. Hunger-

[fol. 683] ford in this Paces Ferry house in Atlanta, in the Spring of 1933?

A. Yes.

Q. And you went down there with Mr. Harold Humphries?

A. Yes.

Q. Did Mr. and Mrs. Hungerford at any time when you

saw them in New York tell you anything about their intentions in regard to this Paces Ferry Road house, in Atlanta?

Mr. Finger: I want to place an objection on the record to this and any other testimony in respect to the question of domicile.

The issue here is only a question of title to this stock in dispute. We contend that the question of domicile has been settled and determined by the judgment of the Probate Court, the Superior Court and subsequently by the Supreme Court in the State of Georgia, in proceedings to which all parties interested in the estate of Julia M. Hungerford in succession, either by virtue of her will, or had there been no will; and by reason of the fact that all parties interested in succession were heard in that case, and the issue as to Mrs. Hungerford's domicile has been determined and no person in interest can be heard further to question it, and are concluded by the two judgments in the State of Georgia.

There is no one here representing a creditor, who might have an interest. The tax commissioner of the State of New York, who claims to be a creditor, cannot be heard in these proceedings, and these judgments of the Georgia courts are entitled to full faith and credit; and to consider any testimony on the question of domicile here would be to fail to give those judgments the full faith and credit to which they are entitled under Article 4, Section 1, of the Federal Constitution, and consequently any such testimony would be inadmissible.

[fols. 684-842] We would like this objection to apply to this and any other question on the question of domicile. I presume Your Honor will dispose of that matter at the final argument, and at that time, if our contention is sustained Your Honor will disregard any testimony on behalf of the administrator c.t.a., as well as our testimony, which was presented, in accordance with my statement in opening, as a matter of precaution.

We rely on the full faith and credit clause of the Federal Constitution, Article 4, Section 1.

May we have an understanding that my objection applies to all questions, this as well as similar questions, without repeating my objection?

Mr. Southerland: I have no objection to that.

* * * * * * *

[fol. 843] IN THE CHANCERY COURT, NEW CASTLE COUNTY

FINAL DECREE—November 8, 1939

On This Eighth day of November, 1939, the above entitled cause having come on to be heard, upon final hearing on the merits upon all the pleadings filed in the cause, oral testimony taken before the Chancellor, and depositions duly taken in the cause and offered in evidence, and the cause having been argued by the Solicitors for the New York Trust Company, Administrator c. t. a. of Julia M. Hungerford, Deceased, and by the Solicitors for Julian Riley and Hughes Spalding, as Executors of Julia M. Hungerford, Deceased, and briefs having been filed by the Solicitors for said respective parties, and the matter having been given mature consideration, thereupon,

It Is Found, Ordered, Adjudged and Decreed by the Chancellor, as follows:

(1) Julia M. Hungerford was domiciled in the State of Georgia at the time of her death on or about November 28, 1935, and Julian Riley and Hughes Spalding, as the Executors named in her Will, have title to the shares of stock in controversy in this cause, to wit, 626 shares of Class A stock and 626 shares of Common stock of Coca-Cola International Corporation, and all unpaid dividends thereon.

(2) Coca-Cola International Corporation, the complainant in the above entitled cause, is hereby ordered and directed to transfer on its books into the names of Julian Riley and Hughes Spalding, Executors of Julia M. Hungerford, Deceased, the shares of stock forming the subject matter of the Bill of Complaint in the above entitled cause, to wit, 626 shares of Class A stock and 626 shares of the Common stock of said Coca-Cola International Corporation, upon delivery to said complainant of the certificates evidencing said stock and upon payment of the stock transfer [fols. 844-1267] taxes incident to the transfer of said stock.

(3) The complainant, Coca-Cola International Corporation, is further ordered and directed to pay over and deliver to said Hughes Spalding and Julian Riley, as Executors of said Julia M. Hungerford, Deceased, all dividends that have been declared upon said shares of stock since the date of the death of said Julia M. Hungerford on November 28, 1935, as well as any dividends that may be declared upon

said stock from the date of this decree down to the time of the making of the transfer of said stock hereinabove directed to be made.

(4) The Chancellor reserves the right to make such further decrees or orders as may be necessary or proper in order to give effect to the opinion heretofore filed in the above entitled cause, or any further opinion that may be filed herein.

(5) The costs of this cause, which are hereby taxed at the sum of Three Hundred Forty-four Dollars and Ninety-eight Cents ($344.98), shall be paid by The New York Trust Company, Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, within thirty days.

Wm. Watson Harrington, Chancellor.

[fol. 1268] IN SUPREME COURT OF DELAWARE

No. 2, January Term, 1940

Appeal From the Court of Chancery of the State of Delaware, in and for New Castle County

THE NEW YORK TRUST COMPANY, a Corporation of the State of New York, as Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, One of the Respondents Below, Appellant,

vs.

JULIAN RILEY and HUGHES SPALDING, as Executors of the Estate of Julia M. Hungerford, Deceased, One of the Respondents Below, Appellee,

and

COCA-COLA INTERNATIONAL CORPORATION, a Corporation of the State of Delaware, Complainant Below, Appellee,

THE NEW YORK TRUST COMPANY, a Corporation of the State of New York, as Temporary Administrator of the Estate of Julia M. Hungerford, Deceased, One of the Original Respondents Below, Appellee

REQUEST FOR ISSUANCE OF WRIT OF APPEAL

Please issue writ of appeal to the Court of Chancery of the State of Delaware, in and for New Castle County, and Citation for the Appellees.

C. A. Southerland, Daniel O. Hastings, Solicitors for The New York Trust Company, a Corporation of the State of New York, as Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, One of the Respondents Below.

[fol. 1269] IN SUPREME COURT OF DELAWARE

CITATION

STATE OF DELAWARE,
(Seal.) To the Sheriff of Kent County Greeting:

We command you, that you cite Julian Riley and Hughes Spalding, as Executors of Julian M. Hungerford, deceased, and Coca-Cola International Corporation, a corporation of the State of Delaware, The New York Trust Company, a corporation of the State of New York, as temporary Administrator of the Estate of Julia M. Hungerford, deceased, to be and appear on the third Monday after the date of the issuance of this writ, and defend the complaint of the New York Trust Company, a corporation of the State of New York, as Administrator, c. t. a. of the Estate of Julia M. Hungerford, Deceased, alleged in a certain appeal from a Judgment rendered against the said New York Trust Company, a corporation of the State of New York, as administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, in a certain action which was before our Chancellor of the Court of Chancery of the State of Delaware, in and for New Castle County, wherein the said The New York Trust Company, a corporation of the State of New York, as Administrator c. t. a. of The Estate of Julia M. Hungerford, deceased, was one of the Respondents and Coca-Cola International Corporation, a corporation of the State of Delaware was Complainant Below, The New York Trust Company, a corporation of the State of New York, as temporary Administrators of the Estate of Julia M. Hungerford, deceased, was one of the Original Respondents Below, and this you are not to omit; and have you there this citation.

Witness the Honorable William Watson Harrington, our Chancellor, at Dover the 24th day of November in the year of Our Lord One Thousand Nine Hundred and thirty-Nine.

W. Marion Stevenson, Clerk of the Supreme Court of the State of Delaware.

C. A. Southerland, Esq. Daniel O. Hastings, Esq.
Issued 1939, November 25.

[fol. 1270] SHERIFFS RETURN

Made Known to Julian Riley, and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, deceased, by acceptance of service of a true copy of the within summons personally in the hands of Richards, Layton, and Finger, Solicitors, for the defendants.

Made known to Coca-Cola International Corporation, a Corporation of the State of Delaware, by acceptance of service of a true copy of the within summons personally in the hands of Alexander Nichols, Solicitor, for the Defendants, The New York Trust Company, a corporation of the State of New York as temporary Administrator, of the Estate of Julia M. Hungerford, Deceased, by acceptance of service of a true copy of the within summons personally in the hands of Paul Leahy, Solicitor, for the defendant and a copy of the Writ of Error left in the hands of Anthony F. Emory Register in Chancery authorized by law to accept such service this 27th day of November A. D. 1939.

[fol. 1271] IN SUPREME COURT OF DELAWARE

[Title omitted]

OPINION—October 29, 1940

LAYTON, C. J., RICHARDS, SPEAKMAN and TERRY, J. J., sitting.

Clarence A. Southerland, Paul Leahy, Daniel O. Hastings and Caleb R. Layton 3d., of Wilmington, for the appellant (Marion Smith and J. Richard Bowden, of Atlanta, Georgia, of counsel).

Richards, Layton & Finger, of Wilmington, James A. Branch and MacDougald, Troutman & Arkwright, of Atlanta, Georgia, for the executors (James A. Branch, Dan MacDougald and Aaron Finger, of counsel).

Appeal from the Court of Chancery of the State of Delaware in and for New Castle County.

Supreme Court, June Term, 1940.

[fol. 1272] LAYTON, Chief Justice:

Coca-Cola International Corporation, a Delaware corporation filed its bill of interpleader in the Court of Chancery against The New York Trust Company, as temporary administrator of the estate of Julia M. Hungerford, deceased, and Julian Riley and Hughes Spalding, Executors of the last will and testament of the deceased, to have determined the question whether the executors or the temporary administrator were entitled to new certificates for the shares of stock in the corporation belonging to the deceased at the time of her death.

Letters testamentary were issued to the executors in probate proceedings in Fulton County, Georgia, upon a probate of the will of the deceased in solemn form, all parties interested in the succession, either under the will, or as in a case of intestacy, having been cited to appear, on the theory that the deceased was domiciled in Georgia. The surrogate's Court for the County and State of New York, upon the information of Robert Hungerford, surviving husband of the deceased, appointed The New York Trust Company as temporary administrator of the estate of the deceased, on the theory that she was domiciled in the State of New York as a matter of law, that State being the domicile of the husband.

[fol. 1273] The executors were directed to file a pleading in the nature of a bill of complaint setting forth their claim to the stock in controversy; and the temporary administrator was ordered to file its answer. Later the will was probated in New York, and letters of administration, c. t. a. were issued to the New York Trust Company.

It was asserted by the executors in their pleading that, at the time of Mrs. Hungerford's death, she was domiciled in Georgia; moreover, in any event, the matter was res adjudicata by reason of the litigation of the matter in the Courts of the State of Georgia and the decisions of those courts holding that the deceased was domiciled in that State.

The answer of the administrator alleged that, at the time of her death, Mrs. Hungerford was, in fact and in law, domiciled in the State of New York; that no other state had

the right to appoint a general domiciliary representative of her estate; and that the State of New York asserted a claim for inheritance taxes against the estate of the deceased.

By the decedent's will the surviving husband was bequeathed the sum of $5000.00 and certain jewelry that he had given his wife. The remainder of the estate was devised and bequeathed to the mother and sister of the de- [fol. 1274] ceased.

Under the Georgia law, a husband, by renouncing a will, does not obtain any larger share of his deceased wife's estate; but in New York, the husband may renounce, and then would be entitled to claim the one-half part of the personal estate.

The case was heard by the Chancellor on oral testimony, stipulations of counsel, depositions and exhibits. He concluded that Mrs. Hungerford, at the time of her death, was legally domiciled in Fulton County, Georgia; that the executors named in the will of the deceased were entitled to certificates for the shares of stock in controversy; and that, having so found, it was unnecessary to consider whether the question of domicile was res adjudicata.

Julia Murphy was born in Atlanta, Georgia, and lived there all her life. She first married Mr. Whitehead, who built a handsome home on West Paces Ferry Road in that City. They were divorced, and in the property settlement Mrs. Whitehead acquired the home. She was, as it seems a wealthy woman in her own right.

Robert Hungerford was born in Watertown, New York. After finishing school he went to New York and was employed by the National City Bank. Later he went into the [fol. 1275] business of manufacturing tile, a business controlled by his mother. He served in the army for about eighteen months. In 1931 or 1932 the title business became so reduced that it was sold. What Mr. Hungerford's source of income was thereafter does not appear. He was interested in the stock market, and was in debt. He lived a bachelor's life in New York at hotels or in apartments, and at the time of his marriage to Mrs. Whitehead occupied rooms or an apartment at the Sherry-Netherlands Hotel in New York on a monthly basis, giving it up at his marriage.

Mr. Hungerford had known Julia Murphy as a young girl at Palm Beach, Florida. He met her when she was Mrs. Whitehead at Palm Beach, Hot Springs, Virginia, and in

New York. In May, 1932, subsequent to her divorce, he met her again in New York, and there saw her frequently. They were invited to a house party at Cambridge, Maryland, and while there on June 12, 1932, they were married.

In the consideration of the evidence there is no reason, we think, to disparage the evidence adduced by the appellant and exalt that of the appellees. Both the executors and Mr. Hungerford have a monetary interest in the outcome [fol. 1276] of the controversy. The suggestion that an impecunious man who marries a wealthy woman probably is indifferent to his place of domicile, and will readily accept the domicile of the wife as his own, needs be guarded against. We know of no principle of law that attributes to a person mean and ignoble motives except as a reasonable inference from proven facts. That there are many residents of the City of New York who believe that residence in that City is one of the greatest of human blessings is readily conceivable. Honesty of purpose and intent must, therefore, be presumed unless the facts compel a contrary conclusion.

The appellees contend that a great variety of facts and circumstances show that Mr. Hungerford, soon after the marriage, intended to make Atlanta his home, and that almost immediately after the honeymoon he actually made, and continued to make, that city his home.

The record is lengthy. A good deal of the testimony is not of great importance. The necessity for keeping the opinion within reasonable bounds forbids comment on all of the testimony; and, in the main, comment will be limited to the facts and circumstances selected by the parties as [fol. 1277] most important in establishing their respective theses.

After their marriage Mr. and Mrs. Hungerford went to New York. There they stayed at the Fairfax Hotel where Mrs. Hungerford had been staying prior to her visit to Cambridge, and not at the Sherry-Netherlands Hotel which had been the home of Mr. Hungerford. It is said that Mr. Hungerford, upon the surrender of his apartment had no fixed place in New York which he could call his home. That may be conceded. But thousands of people, in large cities in general, and particularly in the City of New York, live their lives in boarding houses, rooming houses, hotels or apartment houses, changing them from time to time, and giving up their quarters entirely if contemplating a pro-

tracted absence from the City, knowing that adequate living quarters in the City will always be available. Especially is this true of one who lives a bachelor's existence. The fact is a circumstance to be considered, but it is not inconsistent with domicile in the City of New York. Brafman v. Brafman, — Md. —, 125 A. 161; In re Craigness, (1892) 3 Ch. 180. Nor is it of especial importance that the married pair went to the wife's hotel in New York instead of to that of the [fol. 1278] husband. A bachelor's quarters in a hotel is not necessarily to be considered as an adequate or fit place for a newly married couple especially in a case where the spouse is a woman of wealth.

Before going to Europe as had been planned, Mr. and Mrs. Hungerford, after staying in New York a few days and later going to Atlantic City and Virginia Beach, went to Atlanta. They sailed for Europe on July 9. There they visited Mrs. Gatkins, a cousin of Mrs. Hungerford. Mrs. Gatkins, testified, speaking of the Hungerfords and the Atlanta home of Mrs. Hungerford, that "they always talked of the place", and that on several occasions both Mr. and Mrs. Hungerford urged Mrs. Gatkins to send her son to visit them in Atlanta. This evidence is offered as showing that Mr. Hungerford had made and intended to make Atlanta his home. While admissible for the purpose perhaps, the significance of the evidence is not impressive. The expression, "they always talked about the place", is vague: Invitations, fixing no specific time for visit, are usually regarded as merely politic, not intended to be accepted. No obligation is incurred.

Before going to Europe Mr. and Mrs. Hungerford registered at hotels as being from New York. After their return, in their flittings from place to place, they invariably regis- [fol. 1279] tered at hotels and clubs as from 509 West Paces Ferry Road, Atlanta, Georgia, the home of Mrs. Hungerford. A great deal of space in the record is devoted to this sort of evidence, and apparently the executors went to great expense to collect the proof. There was no denial of the fact, but a very reasonable explanation was offered. Mr. Hungerford testified that, as he and his wife contemplated traveling a great deal, a mailing address was necessary. He suggested the Sherry-Netherlands Hotel, but Mrs. Hungerford objected on the ground that this would necessitate notification to banks, corporations and many people, and suggested her Atlanta home as being more convenient. Mr.

Hungerford was a bachelor with no business occupation. His wife was, as it seems, a wealthy woman with a large income. It may readily be supposed that her mail, in which naturally would be included business letters and dividend checks, was of far greater importance than was his. The arrangement made was the natural and sensible one in the circumstances. In the reported cases the fact of registration as from a given place of abode has not been regarded as of much weight in the determination of domicile. One has the undoubted right to register at hotels either from [fol. 1280] his domicile or from his temporary place of abode. Chambers v. Prince, 75 Fed. 176; White v. Stowell, — Mass. —, 119 N. E. 121; Re Curtiss' Will, 250 N. Y. S. 146.

It is urged that the evidence demonstrates that Mr. and Mrs. Hungerford established in Atlanta all those relationships which are associated with the common and ordinary conception of the word "home". A brief review of the facts is necessary.

Mr. and Mrs. Hungerford returned from Europe on November 9, 1932. After spending a few days in New York, they went to Atlanta, from there to Miami, Florida, where they remained for about ten days, and returned to Atlanta for the Christmas holidays where they occupied the wife's home. They entertained at that house, and there Mr. Hungerford's mother visited them. In the middle of January, 1933, they returned to Miami, and stayed there until about the middle of April. In Florida, Mrs. Hungerford suffered from some sort of a foot ailment, and they returned to Atlanta. The evidence, coming from Dr. Riley, Mrs. Hungerford's brother-in-law, and one of the executors of her will, is clear that the ailment "would not heal, and would not permit her to go on her feet and attend to any activities". She finally was compelled to go to a hospital in Atlanta where she was confined for about one month, and [fol. 1281] there her foot was operated on and she also underwent an appendectomy. Dr. Riley testified that the foot did not heal until after the operation. On October 12, 1933, they went to Hot Springs, Virginia. About November 20, they went to New York, and stayed until December 20, when they returned to Atlanta for the Christmas season; and it is remarkable that they did not occupy Mrs. Hungerford's house, but stayed all the while at the Georgian Terrace Hotel. About the middle of January, 1934, they went to Miami with Mrs. Riley, Mrs. Hungerford's

sister, and Mrs. Murphy, her mother, and there they stayed until April 17. While in Florida, Mrs. Riley became very ill, and Mrs. Murphy suffered a stroke, compelling their return to Atlanta. As a result of a family conference, it was decided, Mrs. Riley being very ill, that Mrs. Hungerford was the proper person to look after the stricken mother, and the result was that Mr. and Mrs. Hungerford took up their residence at the home of Mrs. Murphy in Atlanta. The residence, as it seems, was commodious, and any deficiencies with respect to furniture were supplied from Mrs. Hungerford's home. Mrs. Murphy's death was expected, but, as it frequently happens in such cases, there were alternating spells of sinking and improvement. In [fol. 1282] the summer of 1935, upon Mrs. Murphy's improvement, Mr. and Mrs. Hungerford went to New York, and from there to Atlantic City where they spent the rest of the summer. From there they returned to New York where they stayed for about two months. Mrs. Hungerford was ill. Upon her betterment they went to Atlanta about the first of November, and there, on Thanksgiving day, 1935, Mrs. Hungerford died. During the short married life of about three and one-half years, the only protracted occupation of Mrs. Hungerford's home in Atlanta was in the spring and summer of 1933, when she was suffering from the foot ailment and underwent the operations. It seems clear enough that Mr. and Mrs. Hungerford intended to summer at Narragansett Pier, Rhode Island. He, in fact, did go there in July, but returned to Atlanta upon learning from Mrs. Hungerford that her foot had not improved and that she was not able to leave Atlanta. The residence at Atlanta during this period of time would seem to have been enforced; and it was during the period that most of the entertaining at Mrs. Hungerford's house was done.

The evidence supports the conclusion that when the house was closed in the fall of 1933, it was never re-opened for living purposes.

At this point it is proper to notice certain evidence relied on by the executors as showing that the West Paces Ferry [fol. 1283] Road residence was, in truth and in fact, the home of Mr. Hungerford. The negro butler testified that in getting ready for one of the parties given by the Hungerfords, substantial alterations and improvements were

made to the house, a porch was rebuilt and screened, and a lawn tennis court "was placed on the terrace". It seems to us that the best evidence of the nature, extent and costs of the improvements to the residence would be the testimony of the contractor, builder or workmen who did the work. The evidence of the improvements is most general and vague; and it is noticeable that the executors, who apparently place reliance on the fact that improvements to the residence were made, and who certainly were not hampered by lack of money for the preparation of their case, did not see fit to procure the testimony of those persons best qualified on the point, but were content to rest on the testimony of the butler of Mrs. Hungerford. With respect to the tennis court the evidence is that it "was placed on the terrace". Grading, drainage, foundation building, surfacing, arrangements for back stops, all of those things necessary for a permanent tennis court, are not mentioned. Simply marking out the lines of a court on an expanse of turf is simple, easy to do, and quite inexpensive.

[fol. 1284] In this connection also, a witness testified that "Mr. Hungerford was talking about some plans that he seemed to be drawing up for the house and grounds and he spoke about an outdoor swimming pool". This utterly vague testimony is of little value.

In this same connection the appellees call attention to the fact that when the Hungerfords were living at the Murphy home, work was being done at the residence of Mrs. Hungerford. Statements contained in a letter written by Mr. Hungerford to his mother are quoted, and the inference is sought to be drawn from them that he regarded his wife's house as his home. He wrote, "We will stay here (referring to Mrs. Murphy's home) for the present as Julia has to run the house and take care of her mother's business. We are having five men work on the place on Races Ferry, also housecleaning. I judge we may use it once in a while. However we are staying here for the present". An inference of domicile is not necessarily to be drawn from these expressions. It may likewise be inferred that residence in Atlanta was compelled by Mrs. Murphy's condition. Mrs. Hungerford's property had necessarily to be cared for, and the more pretentious the estate the more care is required. [fol. 1285] There is nothing unusual about the necessity for work to be done on a large estate, even housecleaning, a

very general term, whether the house is in occupancy or not. The clear inference to be drawn from the letter is that the house would be used only once in awhile, and other evidence shows that it was used during that period as a convenient place to give parties. In this connection the testimony of a witness called by the appellees is not without point. The witness was engaged in the real estate business in Atlanta. He had known Mrs. Hungerford from childhood. He was called presumably to prove that in 1934, when Mrs. Hungerford was living at her mother's home, she said that her own house was her home and was not for sale. In 1933, however, it would seem that the house was for sale, as he testified that he obtained permission from Mrs. Hungerford to show a prospective purchaser through the house; and he said that when Mrs. Hungerford was Mrs. Whitehead, he talked with her about selling the place, and that his friendship led him to believe that she was maintaining a play place there while she was staying with her mother.

It is in evidence on behalf of the appellees that, on the return of Mr. and Mrs. Hungerford to Atlanta from Flor-
[fol. 1286] ida in the Spring of 1933, and during that summer when Mrs. Hungerford was incapacitated, the house was fully staffed with servants as a normally conducted house would be, and that regular meals were served there. On behalf of the appellant is the testimony of a friend of Mr. Hungerford who visited Atlanta for a period of ten days in the spring of that year, and who was with Mr. Hungerford almost daily during the period of his visit. He testified that Mrs. Hungerford's house was not fully opened up. Specifically he said, "We had no meals there. We had all our meals at her sister's house or at the Club".

Certain it is that in the fall of that year the housemaids were paid off and dismissed. The butler had been dismissed some time before that. In October, being about to leave for Hot Springs, Virginia, the maid was paid and dismissed by Mrs. Hungerford, she saying to her, "Mr. Hungerford wants to close the house. I don't know why. When I come back I want you to come back and work for me". The other servant was paid and dismissed by Mr. Hungerford. She testified that he said they were closing the house for awhile, and told her "if you are not working when we come back we want you when we come back. This
[fol. 1287] kind of expression is equivocal. The language

is, "when we come back". The inference may, of course, be drawn that they intended to return and live in the house; but it is not unusual in dismissing servants to intimate that only necessity has caused the dismissal; that their services were valued; and that they would again be employed, without any intention of engaging them again. As a matter of fact, the house was not reopened again for living purposes, and when Mr. and Mrs. Hungerford, as has been said, returned to Atlanta for the Christmas season, the servants were not engaged, the house was not reopened, and they lived during that season at the Georgian Terrace Hotel.

In March, 1933, Mr. Hungerford wrote to the West Side Tennis Club, near New York, requesting that his membership be changed from resident to non-resident, saying that his future address would be at the West Paces Ferry Road house in Atlanta; and at the same time and to the same effect he wrote the New York Athletic Club. The memberships were accordingly changed. In January, 1933, he applied for non-resident membership in the Piedmont Driving Club in Atlanta, giving his residence address as the Sherry-Netherlands Hotel in New York, and his business address as 101 Park Avenue, in that City, which was the [fol. 1288] business address of the Tile Company with which he had been connected. In March the club sent him notice of his election, addressing the letter to him at the Park Avenue address. It was returned undelivered. Mr. Hungerford was then in Florida. In April the club wrote him at the house of Mrs. Hungerford in Atlanta saying that it had been brought to their attention that his residence had been changed to the city of Atlanta, and that if he desired to apply for resident membership a new application would have to be made. This application was made in May, upon Mr. Hungerford's return from Florida. In January also he applied for non-resident membership in the Capital City Club in Atlanta, giving his business address as 101 Park Avenue, New York. In November, 1934, the club wrote him that his classification of membership had been changed to that of resident member, he having taken up a residence in the County. The evidence is that he used the facilities of the clubs frequently. The character of membership in a club is generally determined by the fact of residence, and not by actual domicile. The testimony of the clubs' officials is to that effect. Many club members,

contemplating a lengthy absence from the situs of the club, ask transfers to the non-resident classification to save expense, and the evidence clearly is that the New York clubs [fol. 1289] granted such transfers readily. It is to be noted that, consistent with his claim of domicile in New York, Mr. Hungerford made application for non-resident memberships in the Atlanta clubs. The non-delivery of the letter of notification was a prima facie showing that he was not in residence there. For the purposes of the club, as may be supposed, this was sufficient to compel a change of classification. Upon his return from Florida, Mrs. Hungerford suffering from the foot ailment, there was, of course, the possibility of a protracted stay in Atlanta. No person of sensibility is likely to debate a classification of membership in a club when, in fact, its facilities are being constantly used. In the case of the Capital City Club the change of membership was not compelled until November of 1934, when the Hungerfords had been in Atlanta for some months living at the home of Mrs. Murphy. The frequency of his appearance at the club may well have caused comment and criticism. This is not uncommon. The fact is that, in both instances, the change of membership was an enforced, not a voluntary change.

The appellees contend that Mr. Hungerford engaged in one business in Atlanta, and contemplated another business [fol. 1290] there.

Shortly after the marriage, Mr. Hungerford caused to be incorporated in Delaware the Trebor Securities Corporation for the purpose of trading on the stock market. Mrs. Hungerford furnished all of the capital and she owned all of the stock. The bank account of the corporation was at a New York Bank. The address "to which letters, statements from the Bank and other communications were to be sent," was given as the West Paces Ferry Road house in Atlanta. In Atlanta, Hungerford had no office. He frequented the brokerage establishment of Beers and Co. The corporation had a safety deposit box in Atlanta, it having been rented in June, 1933. There Mr. Hungerford kept certain personal effects. These are undenied and undeniable facts, but we are unable to draw sure inferences from them. Mr. and Mrs. Hungerford had planned to travel a good deal, and did so. The mailing address at her home in Atlanta had been decided upon. The instructions to the New York bank for the forwarding of communications was consistent

with the mailing address agreed on. Trading on the market is a transitory matter. An individual trader, ordinarily, needs no office, and the securities corporation was essentially individual. Trading on the market can be done while [fol. 1291] travelling. Brokerage houses welcome traders. Having a safety deposit box conveniently at hand has little bearing on the question of domicile.

In January, 1934, it appears that Mr. Hungerford wrote the attorneys in New York who had organized the Securities Company, saying that as it was very doubtful that he would be in New York for a good many months, it would be for his own best interest to have the tax returns of the corporation made up in Atlanta where he could give it the necessary attention. Trading on the exchange had been done in Atlanta, and it is reasonable to suppose that the records and papers necessary for the making up of tax returns were there. Atlanta was a convenient place of the preparation of the tax return. New York was not. But the inference the appellee draws from the statement is not compelled. In the matter of Davis, 217 F. 113, the question was whether a bankrupt was domiciled in New Jersey or California. In a letter he stated, "I doubt if I shall see East Orange for some months yet." The learned Court regarded the expression as significant, and as indicative of an intention to return to his old home.

Julian Riley, one of the executors, testified that Mr. Hun- [fol. 1292] gerford was investigating, as he believed, the possibility of representing National Distillers Company, or some branch of it, in Georgia, as a wholesale whiskey representative; and that he had selected one of the vacant Murphy properties in Atlanta as a warehouse. It was also in evidence on behalf of the appellees that in 1935, Mr. Hungerford approached a business man in Atlanta for a letter of introduction to someone connected with National Distillers Corporation for the purpose of obtaining an agency in Georgia for some large whiskey manufacturing concern, and a letter of introduction was accordingly given.

The explanation given of this circumstance by Mr. Lamphier, a graduate of West Point, and a former officer in the United States Army, is sufficient to repel the inference sought to be drawn from it. He testified that he knew Mr. Hungerford; that about the time the people of Georgia were considering the repeal of the prohibition laws of the

State, he, in New York, called Mr. Hungerford, in Atlanta, and talked with him over the telephone, for the purpose of asking him whether he could assist him in getting an agency for any of the large distilling companies in Georgia, and, if such agency could be procured, to obtain assistance in [fol. 1293] financing the project; that Mr. Hungerford replied that he had some connections that might help him in financing the proposed business, and knew a man closely connected with National Distillers Corporation; but said that if he, Lamphier, was interested in taking an agency, he would have to move from New York to Atlanta, as he, Hungerford, was not interested in tying himself up.

The evidence most strongly relied on by the appellees is given in regard to the income tax returns of Mrs. Hungerford for the years 1933 and 1934. Mr. Hungerford, for those years had no taxable income to report and filed no returns anywhere. Mrs. Hungerford's returns were made up by public accountants engaged by Mr. Hungerford, and were filed in Georgia, and while Mrs. Hungerford, at times at least, was present at conferences, Mr. Hungerford, in general, looked after the matters.

Under the Georgia Income Tax Law, the word resident is defined as follows: "The word 'resident' means natural persons, and includes, for the purpose of determining liability to the tax imposed by this law upon or with reference to the income of any taxable year, any person domiciled in this State, and any other person who maintains a place of [fol. 1294] abode within the State and spends in the aggregate more than six months of the taxable year within the State."

The income tax blanks of the State of Georgia contained the following question: "Were you a resident of the State of Georgia on December 31st, 1932? (or the year for which the return is made).

"If not, did you spend in the aggregate more than six months within the taxable year within the State"?

In both of these years Mrs. Hungerford was taxable as a resident she having maintained a place of abode in the State and having spent therein more than six months of the taxable year. To the first question she answered, "Yes"; and this circumstance is seized upon as proving conclusively that she was, with her husband's knowledge and approval, domiciled in the State of Georgia. Mr. Moore a public ac-

countant employed by the firm that prepared the tax returns testified that the full exemption of $3500.00 was taken by Mrs. Hungerford at Mr. Hungerford's direction.

The learned Court below misconceived, as we think, the meaning and effect of the Georgia law, and drew an inference that was not warranted. In the statement of facts it was said, "Under the Georgia law, a person domiciled in [fol. 1295] that State was entitled to an exemption for income tax purposes of $3500, while other taxables were merely entitled to an exemption of $1000. Mrs. Hungerford claimed the $3500 exemption on her report." In the opinion proper it was said, "Under the law of Georgia, a person who resides in that State for more than six months in any one year is required to pay an income tax. The exemption given such a person is, however, much less than that allowed a person who is domiciled there. Mrs. Hungerford, in effect not only stated in her State return that she was domiciled in Georgia, but claimed and deducted an exemption accordingly."

The definition of the word resident in the Georgia law is plain and clear. Included in the definition are two classes of persons, those actually domiciled in Georgia, and those, who, although domiciled elsewhere, have maintained a place of abode within the State and have spent in the aggregate more than six months of the taxable year in the State. Each of these classes of persons are required to pay the Georgia tax on all their income wherever it may have accrued, and all married persons living with husband or wife, who are within the embrace of the definition, are entitled to the same [fol. 1296] exemption of $3500. The first question on the tax return blank does not purport to distinguish between domiciled persons and resident persons. The exemption of $1000 mentioned by the learned Chancellor would seem therefore to be that allowed to non-residents who in Georgia, as in many states, are required to pay income taxes on income received from property owned or business conducted in the State. Mr. Tomkins, the public accountant called by the appellees, testified that a person in the situation of Mrs. Hungerford would answer the first question by "yes", and would not answer the second question.

The witness, Moore, actually made up the returns. He testified that he understood from Mr. Hungerford that he was a resident of New York; and such was the impression

made upon him that he made an office memorandum for the attention of his superiors. The memorandum was as follows: "It is questionable under those conditions whether or not a married person is entitled to the full exemption where one maintains residence in one state and the other maintains residence in a different state."

Mr. Tomkins, the resident partner of the firm of accountants, also called by the appellees, contradicted his employee. [fol. 1297] He testified that Mr. Hungerford gave his address as at the West Paces Ferry Road residence; that he regarded him as a resident of Atlanta; and that the memorandum submitted by Mr. Moore did not at all raise the question whether Mr. Hungerford was a resident of New York, but as he testified, "We had reference to what was shown in the income tax return that Mr. Hungerford had made and return to New York. That was shown in the 1932 return, and we followed that in the 1933 return, which was the first one we prepared."

It is difficult, and at times unpleasant, to choose between contradictory statements; but we see no sufficient reason not to accept the positive testimony of Mr. Moore.

In view of this positive testimony we are unable to say that deception was practiced upon the accountants by Mr. Hungerford. They had knowledge that his claimed residence was in New York. Whether he knew that the Federal income tax returns of his wife should have been filed in New York, and whether he knew that it was necessary that a return of his wife's income should be made to the State of New York, are matters not disclosed by the evidence. The maxim is, of course, that every one is presumed to know [fol. 1298] the law, and the facts are properly to be considered in estimating the weight to be given to the particular evidence; but we are not satisfied that, from them, domicile of Mr. Hungerford in the State of Georgia is an inevitable deduction.

In August and September of 1935, Mr. Hungerford wrote accountants in Atlanta that Mr. Hungerford had been ill in New York but would return to Atlanta when well and would then pay any tax due the government; and that any claim of the government for taxes would be taken up and given proper attention upon her return to Atlanta.

These expressions of intent to return to Atlanta have no great significance. Undoubtedly Mr. and Mrs. Hungerford

intended to go back to Atlanta in the fall of 1935. Her mother was ill there. All of the papers and records necessary for any correction of income tax returns were there.

It is in evidence that when Mr. and Mrs. Hungerford left Atlanta in the summer of 1935, she told her personal maid that she expected to be gone only a few weeks; that she wrote her maid referring to her Atlanta residence as her home, and gave instructions for the care of the lawn; and that upon her return she stated to a friend of hers that she [fol. 1299] was glad to be back and "would be there right along." At best these statements are ambiguous. Moreover, there is no evidence that they were made in her husband's presence, or that he had knowledge of them. Declarations of a wife are not evidence that controls the domicile of her husband. Chambers v. Prince, supra; Parsons v. City of Bangor, 61 Me. 457.

Non-residents, under the Georgia law as we understand it, were allowed to operate automobiles without a Georgia license for a period of thirty days only. This, or a similar limitation, is a usual one, and the fact that an automobile of Mr. Hungerford was licensed under the Georgia law is of the least significance.

Mr. Hungerford testified that, upon his marriage, he and his wife discussed the matter of their future residence; that he told her that he wanted to go back into business, and had the promise of financial backing by a friend; that his wife replied that as he was not in business at the time, it was her desire to travel for two years, and that then she would be willing to settle down permanently in New York. To this he replied that he was not financially able to travel, and wanted to rehabilitate himself in business, but that this [fol. 1300] objection was met by his wife's saying that she had ample money, and that the plan of travel would be a wedding present to both of them.

This is the basis for the appellant's contention that there had been no change of Mr. Hungerford's domicile.

Statements made by a deceased person related by one expecting to benefit from them are to be scrutinized carefully. If they are unsupported by other evidence, they may be given little or no credit. But, in the instant case, there is ample evidence and from disinterested witnesses that Mr. Hungerford made statements of his plans and purposes when, obviously, there was no reason to speak other than the truth; and that Mrs. Hungerford herself stated on

several occasions that she and her husband intended to live in New York, but were going to travel for some time, or statements of similar import. The fact is that they did travel extensively. During their short married life they stayed for varying periods at more than twenty hotels and clubs.

It is not disputed that, at the time of his marriage, Mr. Hungerford was domiciled in the City of New York. Their application for passports, and banking account in Paris [fol. 1301] while they were in Europe bespoke the fact. Certainly shortly after their return from Europe in the fall of 1932, they were looking for a cooperative apartment in New York City. Under the guidance of a well known real estate man, Felix Isman, they were shown a number of apartments. He later received a letter from Mrs. Hungerford saying that something had happened that would take them away from the City, and that upon her return she would conclude the matter. Furthermore, the matter of Mrs. Hungerford's furniture in Atlanta was discussed; and the witness related that Mr. Hungerford said that if she could sell her house with the furniture she was going to do it, but if not she could move the furniture to New York. Cecelia Wheeler testified that after his marriage she was told by Mr. Hungerford that he and his wife, had been traveling in Europe, and visiting in Atlanta with his wife; that they were going to look for a cooperative apartment in the City; and that upon her trying to interest him in purchasing her home in Spring Lake, New Jersey, he said he would not live anywhere but in New York City. Helen Best testified that she attended the Hungerford wedding; that about that time Mrs. Hungerford put through a long dis- [fol. 1302] tance call to Atlanta, and heard her give instructions to put her Atlanta residence on the market for sale; and that she had frequent conversations with Mrs. Hungerford in which was discussed their renting or buying an apartment in New York. James Converse testified that the Hungerfords told him in Atlanta in 1933, that they were only temporarily in Atlanta as they were going South for the winter. The contract bridge expert, Hal Sims, testified that in the fall of 1933, he attempted to sell the Hungerfords one of his properties in New Jersey, but that he understood from them that they preferred to live in New York and were living there at the time. Harry Whitlock testified that, soon after the marriage, both Mr. and Mrs. Hungerford said to

him that the Atlanta house would probably be sold, or closed; that they intended to travel for a year or two, and that it was their intention to get an apartment and live in New York. Mrs. John Gaston testified that possibly a year after the marriage she asked the Hungerfords when they were going to settle down, and that they said they were going to visit Mrs. Hungerford's mother, and were going to Miami for awhile; that she tried to interest them in buy-
[fol. 1303] ing a place on Long Island, but they said they were going to take a co-operative apartment in New York; and that Mrs. Hungerford said the only place in which her husband would be happy was New York. Tom L. Johnson testified that in the fall of 1933 Mrs. Hungerford told him that she and her husband were going to Florida, but would be back in New York in the spring and would make their home there. Minna Lee testified that in the Florida season of 1933, at Miami, Mrs. Hungerford told her that she and her husband were travelling a good deal and were making their home in New York City; and that in the season of 1934, Mrs. Hungerford told her that they were called to Atlanta as her mother was very ill. John Gaston testified that he met Mrs. Hungerford for the first time after her marriage with Mr. Hungerford; that he was a house guest of the Hungerfords in Atlanta in the spring of 1933; that possibly six months later the Hungerfords told him they were trying to sell the Atlanta house but that it had not been done; and that in the fall of 1935, in New York, when Mrs. Hungerford was improving after an illness, he and Mr. and Mrs. Hungerford spent three or four days in looking at apartments; and that when he saw her off on the train [fol. 1304] she said she was going down to Atlanta for possibly two weeks or so; that she wanted to get her clothes and things, and come back to live in New York. Felix Isman also testified that in 1935, shortly before Mrs. Hungerford's death, when she and her husband were in New York, he heard again from Mr. Hungerford about an apartment. He understood from Mr. Hungerford that they had been detained in Atlanta by reason of illness of Mrs. Hungerford's family, and again were desirous of finding an apartment in New York. He got a further list of apartments, a half-dozen places perhaps, and looked them over with Mr. Hungerford.

When sued in Atlanta upon service by copy made at the Atlanta residence, Mr. Hungerford made affidavit of non-

residence in the State of New York. On the part of the appellees it is pointed out that when the issue of residence was before the court for hearing, Mr. Hungerford defaulted. We see, however, no reason to infer perjury or bad faith in this circumstance. If he hoped to compromise the suits, and that appears to have been his purpose, time was needed. If, in fact, he was not a resident of Georgia, he could obtain [fol. 1305] time by objecting to the jurisdiction of the court. This is done constantly without suggestion of false purpose.

For some reason Mr. Hungerford wanted to change his name. His attorney in New York advised him that this could not be done in New York unless he were a resident of that State; and that he saw no reason why he could not claim a hotel residence in New York City if he had not voted in Atlanta. To this letter Mr. Hungerford replied that he regarded New York City as his place of residence and claimed the Sherry-Netherlands Hotel as his last residence.

This Court, ordinarily, will not disturb a finding on the facts in a hearing before the Chancellor, if it appears from the record that there was evidence to support the finding. Chalfant v. Reinhardt, 12 Del. Ch. 389, 113 A. 674. The reason for the rule, generally observed by reviewing courts, is that the trial court sees and hears the witnesses, and is, therefore, the better able to determine the credit and weight to be given to their testimony. Henderson vs. Plymouth Oil Co., 16 Del. Ch. 359, 141 A. 197. The reason for the rule falls when a large part of the testimony was not presented [fol. 1306] orally, as here. Moreover, a finding of fact is something different from an inference from facts; and in such case we have not hesitated to draw our own inferences. Peyton v. William C. Peyton Corporation, 7 A. 2d 737.

The ultimate fact in issue is domicile. This is a question of law based on facts. The so-called finding of fact is a deduction, a process of reasoning or logical inference. In such case the reviewing court is as competent to judge of the correctness of the conclusion as is the lower court. In re. Dorrance, — Pa. —, 163 A. 303. As an appeal is a review of both law and fact, it is the duty of this court, in the instant circumstances, to draw its own inferences and to reach its own conclusions.

We are not concerned here with a situation where, in appropriate circumstances, a wife may select a domicile apart from that of her husband. The rule of the common

law, founded on the theoretic identity of husband and wife, and still demanded by the theory of civilized law, is that a woman, on her marriage, loses her domicile and acquires that of her husband, no matter where she resides, or what she believes or intends. The domicile of the wife is with her husband, not as a matter of evidence or of presumption; [fol. 1307] but as a matter of law. 17 Am. Jur. 614 et seq.; 1 Beale, Confl. Laws, 198.

A domicile once established remains the legal domicile until a new one is acquired. The essentials of domicile of choice are the fact of physical presence at a dwelling place and the intention to make that place home. There must be a concurrence of fact and intent. The absence of either precludes the change, State v. Frest, 4 Harr. 558. There must be an actual abandonment of the first domicile coupled with an intention not to return to it, and the acquisition of a new domicile by actual residence in another place with the intention of making that place a permanent home. Whether one has changed his domicile from one place to another must depend largely on his intention. The intention must be of permanent or indefinite living at a given place, not for mere temporary or special purposes, but with a present intention of making that place home unless or until something uncertain or unexpected shall induce the adoption of some other permanent home; or, negatively expressed, there must be an absence of any present intention of not residing at the place permanently or for an indefinite time. It follows that absence from one's place of [fol. 1308] residence, even for a long time on business, pleasure, reasons of health, education of children, or other special purpose, will not effect a change of domicile if, all the while, the person intends to be absent only for the accomplishment of the temporary purpose and to return to his former place of residence upon the fulfillment of the purpose. The intention to return must, of course, be fixed, certain and constant. A loose, indefinite, or as it is called, a floating intention to return will not avail to prevent a change of domicile. Declarations of intention or purpose are, of course, admissible, but they must give way to definite and unequivocal acts and conduct. 17 Am. Jur. Title, Domicile; 1 Beale, Conf. Laws, 133, 186, 198, 246; Texas v. Florida, 306 U. S. 398; Collins v. City of Ashland, 112 F. 175.

The evidence affirmatively showed that Mr. and Mrs. Hungerford planned to travel for a period before settling

down in an apartment in New York City. They did travel extensively. They occupied Mrs. Hungerford's home for several months in the spring and summer of 1933 because of Mrs. Hungerford's physical condition. In the autumn of that year they began to travel again. The Atlanta house was closed and left in charge of a caretaker; the servants [fol. 1309] were dismissed; and it was never lived in again. In 1934, contrary to their desires and expectations as Mr. Hungerford testified, they were compelled by the illness of Mrs. Murphy to remain in Atlanta, and during this period they lived at her home. When in 1935, it appeared that Mrs. Murphy's condition had improved, they left Atlanta, spent the summer at Atlantic City, went to New York in the fall, and there again began a search for a suitable apartment. And, as she left New York for Atlanta, she made the unequivocal statement that she wanted to get her clothes and things and come back to live in New York.

There is nothing in the record before us suggestive of discord between Mr. and Mrs. Hungerford. There is no evidence of clash of opinion or desire with respect to their residence. On the contrary, disinterested witnesses have testified to repeated statements of purpose and intention on the part of both of them to make their home in New York, not only at the beginning but close to the end of their married life. Apart from conjectural inference there is nothing to indicate that Mrs. Hungerford's willingness to live in New York depended upon the sale of her Atlanta property. The two extended periods of residence in Atlanta [fol. 1310] are accounted for, and, as we think, satisfactorily. It is argued that during the period of Mrs. Murphy's illness there was ample time for Mr. Hungerford to go to New York and there establish a residence. This may be conceded. But it is not likely that he would have selected an apartment in the absence of his wife. Husbands, as a rule, are not so bold. Separating himself from his wife during her mother's illness when she was compelled to supervise her mother's house and to look after her business affairs would, perhaps, have been regarded as conduct selfish and heartless. It does not follow that Mr. Hungerford, by conduct, adopted Atlanta as his home because, in the clutch of the circumstances, he did not press for removal to New York.

The learned Chancellor observed that the fair inference from the evidence was that any contemplated removal to

New York depended largely on what was to be done with the Atlanta house; and he specifically held that the evidence justified the conclusion that, long prior to the death of Mrs. Hungerford, Mr. Hungerford, in point of fact and purpose, had made Atlanta his home, and had continued to make it his home for an indefinite time; and that any possible intent [fol. 1311] on his part to return to New York depended on the attitude of Mrs. Hungerford, and was, therefore, a mere hope or wish, of an indefinite, floating nature that in no way affected his becoming legally domiciled in the State of Georgia.

We have studied the long record carefully and argumentatively; and, applying the law to the facts of the case, we are unable to find in the evidence justification for the conclusion that Mr. Hungerford's intention to return to New York was so uncertain and indefinite that his domicile in Georgia must be inferred. The intention of a person absent from his place of residence to return to it is an important fact to be considered in determining a question of alleged change of domicile. His acts and conduct may be such as to transcend his expressed intention, but the evidence, in such case, must be certain and unequivocal.

It is a fundamental proposition that one whose right to relief depends on the establishment of the domicile of another at a given place has cast on him the onus of proof. This burden never shifts, although, from time to time, the duty of going forward with the evidence may shift from the [fol. 1312] one party to the other. The fact of actual residence in a place is prima facie evidence of domicile there; and in the absence of explanatory evidence, the conclusion would be justified that the place of residence is the domicile of the person there resident. Upon proof of residence, explanation is demanded. The explanation may, or may not, be satisfactory. But, nevertheless, the party asserting and relying on a change of domicile sustains the burden of proving the change by a fair preponderance of the evidence. 17 Am. Jur. 640; 2 Jones Ev. #176; Page v. Camp Mfg. Co., 180 N. C. 330, 104 S. E. 667; Zenner v. Goetz, 324 Pa. 432, 188 A. 124.

We are of opinion that the appellees did not sustain the burden of proof. It follows that the domicile of Mr. Hungerford, at the time of the death of his wife, was in the State of New York, and, therefore, as a matter of law, the domicile of the testatrix, his wife, was in that State.

The second question for decision is one of law. The appellees contend that the question of Mrs. Hungerford's domicile is res adjudicata by reason of the judgments of the Georgia courts in the probate in solemn form of her will. The facts relative to those proceedings are stated at length [fol. 1313] in the opinion of the late Chancellor Wolcott, in Coca-Cola International Corporation v. New York Trust Company, et al.; 2 A. 2d. 290, and need not be restated. The important fact is that, while Mr. Hungerford was cited to appear in those proceedings, and did appear, and did file a caveat against the allowance of the will, and did pursue his contention to the Georgia Supreme Court, yet the appellant was not a party to those proceedings.

It is admitted that the situs of the shares of stock in controversy is in this State. We have found as a fact that the domicile of Mrs. Hungerford, at the time of her death, was in New York. While there may be two administrations in the same estate, the one domiciliary, the other, ancillary, the principal administration or appointment must be that place where the deceased had her last domicile. All the authorities concur in the conclusion that, according to the principles of international law universally adopted, the administration had at the domicile of the decedent is to be regarded as the principal administration, and that all foreign administrations, granted by reason of personal assets found in a state foreign to that of the domicile, are regarded as subordinate or ancillary. The administration at the [fol. 1314] place of domicile is, in its nature general and unlimited, while the ancillary administration is special and limited. Civilized nations recognize the principle that the personal estate of a deceased person, for the purposes of succession and distribution, has no other locality than that of his domicile. Subject only to the right of a foreign state to administer property within its borders for the protection of its own citizens, the domiciliary representative becomes invested with the title to all of the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue according to the law of the place of domicile or the directions of the will as qualified by that law. Wilkins v. Ellett, Admr., 9 Wall. 740, 19 L. Ed. 586; Vogel v. New York Life Insurance Co., 55 F. 2d. 205; 11 R. C. L. 429.

[fol. 1315] An administrator with the will annexed may,

in general, exercise the same powers and authority that could have been exercised by the executor named in the will had he qualified. Accordingly, it is contended that the domiciliary representative alone has the right to maintain a suit in Delaware on behalf of the estate for the recovery of assets.

If any portion of the estate of a decedent is situated in a foreign state, the domiciliary representative, apart from statute, cannot recover possession by suit without taking out ancillary letters in the foreign jurisdiction, not because of any defect of title to the possession, but as a qualification of the general principle in respect of personal property by the comity of nations, founded on the policy of the foreign state to protect the interests of its home creditors. Wilkins v. Ellett, Admr., supra; St. James' Church v. Walker, Admr., 1 Del. Ch. 284. This rule is not applicable in Delaware because of statutory provisions. Deringer's Admrs. v. Deringer's Admrs., 5 Houst. 416; Terry v. Stull, 19 Del. Ch. 412, 168 A. 251.

The statute (Revised Code, 1935, Secs. 3868-3870, provides that letters testamentary, or of administration, [fol. 1316] granted in any other state, and produced under the seal of office, or court, granting the same, shall be received in this State as competent authority to the executor or administrator, therein named; and the effect of the statute is to allow suits to be brought by foreign executors and administrators, under the limitations of the statute, without grant of ancillary letters in this State. Terry v. Stull, supra.

Such statutes refer to domiciliary executors or administrators, and not to subordinate or ancillary representatives. This is implicit in the language of the Court of Errors and Appeals in Deringer's Admrs. v. Deringer's Admrs., supra, where it is said "the law of this State has provided a very simple substitute for ancillary or subsidiary administration", recognizing, as we think, the fact that the foreign representation must be primary or domiciliary; and such statutes are so construed. Harrison v. Mahorner, Exr., 14 Ala. 829; Moore v. Jordan, 36 Kan. 271, 13 P. 337, 59 A. R. 550; and see Taylor, Admx. v. McKee, Admx., 121 Ga. 223, — S. E. —. It would seem to be clear that the statute is an enabling act; and that its purpose is to remove a disability, not to confer additional rights and powers on rep- [fol. 1317] resentatives of decedent's estates.

The case before us ought not, however, to be decided on grounds that may be thought technical; and the essential question is whether the domiciliary administration, the appellant here, is bound by the Georgia judgment rendered in a proceeding to which it was not a party. The answer must be, on principle and authority, that it was not bound by that judgment.

Due process of law means law in accordance with the fundamental principles of justice, and its essence is notice and an opportunity to be heard before judgment. Sportuno v. Woods, 8 W. W. H. 378, 192 A. 689.

The late Chancellor, in Coca-Cola International Corporation v. New York Trust Company, supra, accurately stated the legal principles by which the case must be governed. In that case the Chancellor was confronted with a motion for decree notwithstanding an answer alleging, inter alia, that the true domicile of Mrs. Hungerford, the testatrix, was in the State of New York. The truth of the allegation, for the purpose of the motion, was, of course, admitted.

The learned Chancellor was of opinion that it was inherent in the decision of the Court of Errors and Appeals [fol. 1318] of this State, in Deringer's Admr. v. Deringer's Admr., 5 Houst. 461, 1 A. S. R. 150, that the domiciliary representative of a deceased person is entitled to receive and administer all of the personal estate of the deceased wherever found, subject to the right of a foreign State to administer property within its borders for the protection of its citizens, and that the proposition was practically of uniform acceptance in this country, citing Wilkins v. Ellett, Admr., 9 Wall. 740, 19 L. Ed. 586; that under the full faith and credit clause of the Federal Constitution (Art. 4 #1) and the Act of Congress passed in pursuance thereof (28 U. S. C. A. #688) inquiry was not precluded into the jurisdiction of the court in which judgment is rendered over the subject matter, or the parties affected by it, or into the facts necessary to give jurisdiction, citing Mitchell, Vance & Co. v. Garrett, Ferris & Co., 5 Houst. 34; Thormann v. Frame, 176 U. S. 350, 20 S. Ct. 446, 44 L. Ed. 500; and that the appointment of the administrator c. t. a. in New York, as well as the appointment of the executors in Georgia were essentially judgments in rem, final and conclusive as to property located in the appointing jurisdiction, but the property located in this jurisdiction was not

[fol. 1319] a subject matter within the operation of either of those judgments, citing Overby v. Gordon, 177 U. S. 214, 20 S. Ct. 603, 44 L. Ed. 741. Expressing no opinion on the question whether the Georgia judgment might not be pleaded as an estoppel against a party who was cited to appear and did appear in the probate of the will in solemn form in the Court of Ordinary of Fulton County, Georgia, if such party were to seek elsewhere to relitigate against the executors the question of the Georgia domicile, the Chancellor proceeded to say that such contention could not be made in the case before him for the reason that the New York Administrator was neither a party to the Georgia proceeding nor in privity with such party; and he concluded that there was power in the appropriate Delaware tribunals to determine, so far as the property located in this State was concerned, where the deceased testatrix was domiciled at the time of her death to the end that the local effects might be sent to the seat of domiciliary administration.

We have found as a fact that the domicile of the testatrix was in the State of New York at the time of her death, and the situation that confronts us is precisely the same [fol. 1320] as that before the late Chancellor.

A discussion of the many cases cited in the briefs would extend this opinion to an unreasonable length; moreover the principle involved is so universally accepted that discussion is unnecessary. No case cited either by the appellant or the appellees suggest that one who is neither party to a judgment nor in privity with a party thereto is, or may be, bound by the judgment under the full faith and credit clause of the Federal Constitution.

Tilt v. Kelsey, 207 U. S. 43, 28 S. Ct. 1; Burbank v. Ernst, 232 U. S. 162, 34 S. Ct. 299; Baker v. Baker, Eccles & Co., 242 U. S. 394, 37 S. Ct. 152; Holland v. Jackson, — Tex. —, 37 S. W. 2nd 726; In re Fischer's estate, — N. J. —, 180 A. 633, are in accord with the principles announced in Thormann v. Frame, supra, and in Overby v. Gordon, supra.

All of them are cases involving disputes with respect to domicile as between domiciliary and ancillary administration of decedents estates. In all of the cases the principle is declared that a judgment of a probate cannot, as a judgment in rem, bind the courts of another state on the question of the domicile of the decedent.

[fol. 1321] In DeMora v. Concha, L. R. 29 Ch. Div. 268, affirmed in the House of Lords, L. R. 11. App. Cas. 641, cited with approval in Thormann v. Frame and Overby v. Gordon, it was in dispute whether a decedent was domiciled in England or in Chile. The London Probate Court, upon a caveat filed against the probate of a will by a daughter of the decedent, and issue framed, expressly decided in favor of the domicile being in England and not in Chile, as claimed by the daughter. Later, in a subsequent action in the Court of Chancery for distribution of assets, the daughter again sought to litigate the question of the domicile of her father, and she was allowed to do so against the objection that the judgment of the court of probate on the question of domicile, was conclusive first as a proceeding in rem which operated as an estoppel against all the world; and second, as a proceeding inter parties, operative as res adjudicata by reason of the actual contest made by the daughter. But Lord Blackburn, in the House of Lords, observed that the decision of the court of probate was conclusive on all the world only to the extent that there was an executor who was entitled to have probate in England for the purpose of getting in and taking the property which [fol. 1322] was in England, and to that he was entitled if there was a will which made that executor a good executor according to the law of England; but that the judge of probate had no right to say that the testator was or was not really a domiciled Englishman, and no court of another country would be obliged to admit that the decedent was a domiciled Englishman. And, on the assumption that the order entered by the probate judge had declared the decedent's domicile to be in England, proceeded to say

"Supposing he had done so, and supposing that he was wrong, and the fact was that the testator had not been really domiciled in England, but had been domiciled in * * * New York * * * could it possibly have been said that the court of New York * * * would have respected the decision of the judge ordinary * * *? I cannot think so."

It is to be noted that the effect of the decision is that a finding of domicile in a probate proceeding is not binding even on the next of kin who are parties to the proceeding, for the reason that a finding of domicile is not necessary to the probate of a will; and it would seem that

in the probate of Mrs. Hungerford's will, Chief Justice Russell, of the Supreme Court of Georgia in his dissenting opinion, 183 Ga. 547, 189, S. E. 2, was of like opinion, for he expressed the view that the question whether the testa- [fol. 1323] trix was a resident of or domiciled in Fulton County was wholly irrelevant upon the only question which should have been submitted upon the probate of a will, namely, the factum of the will, devisavit vel non.

In Thormann v. Frame, supra, and in Overby v. Gordon, supra, the party in interest before the Court was not a party to the probate proceedings and judgments which were sought to be invoked as having conclusively determined the question of the decedent's domicile, as was the fact in Demora v. Concha, supra; and, as the language of the Court is to be taken with reference to the facts before it, we do not assume to say that the Supreme Court of this country has held that a finding of domicile in a probate proceeding is not binding even on the next of kin who was a party to the proceeding. That Court in the cases cited, was not, nor are we here, called upon to consider the operation of a judgment in a probate proceeding in one jurisdiction as an estoppel against one who, although a party to that proceeding, undertakes, in a proceeding in another jurisdiction affecting the same decedent's estate, to raise again the question of the decedent's domicile.

It is sufficient to say that the Georgia judgment, as a judgment in rem, binds only the property within the con- [fol. 1324] trol of the Court which rendered it, and the property in controversy here is not within its control; and as a judgment in personam, it cannot bind the appellant, for it was neither a party to that judgment, nor was it in privity with a party.

In Baker v. Baker & Eccles & Co., supra, in speaking of the argument ab inconvenienti pressed by the plaintiff in error, the Court said that unless all possible distributees can be brought within the jurisdiction of a single court having authority to pass on the subject matter either by service of process or by voluntary appearance, it must be in many cases impossible to have a single controlling decision on the question of the domicile of a decedent. The appellees, laying especial emphasis on the word, "distributees", contend that if all possible distributees, that is, all persons interested in the succession, are brought before one court of competent jurisdiction by service of process or appear-

ance, the whole world is bound on the question of domicile as decided by that court, even though the true domicile was elsewhere. In the case cited, the parties chiefly interested were distributees. The language of the Court was directed [fol. 1325] to the facts. We think the Court held no more than this, that one not a party to a judgment nor in privity with a party is not bound by it.

At one point in their briefs, the statement is made that the appellant and Mr. Hungerford are, in substance, the same on a question involving the succession. This is an oblique way of saying that, in the eye of the law, they are in privity. If that is what is meant, it is not the law. Coca-Cola Co. v. Pepsi-Cola Co., 6 W. W. H. 124, 172 A. 260; Forbes v. Douglass, 175 Mass. 191, 55 N. E. 847. The fact that the temporary administrator in New York was appointed on the petition of Mr. Hungerford is of no consequence. At another point in the briefs it is said that it is immaterial that there is no privity between the heirs-at-law and the personal representative of the estate, for the reason that lack of privity exists only to the extent of the interest of creditors. This is obscure.

Again, the appellees characterize the appellant as the representative of a mere creditor or tax claimant; and, it is said, that as such creditor or claimant is not entitled to be heard on the succession or probate of a will in the first instance, the appellant here cannot, after the succession has [fol. 1326] been determined, put the succession in issue. The appellant, however, is far more than being the representative of a mere creditor or tax claimant. Any claim that the State of New York may have for inheritance taxes or other taxes is not the basis of its right to be heard on the question of domicile. That right proceeds from the fact that the decedent was its domiciled citizen at the time of her death; and the appellant, appointed by the authority of its proper court, is its arm to gather together, in so far as is permitted by law, the personal property of the deceased, and to administer and distribute the property according to her will and the laws of the State. Being the seat of domiciliary administration, it is not compelled to press its claim for taxes in a jurisdiction of ancillary administration.

The argument that the judgment probating the will and qualifying the executors drew to the court of ordinary, against all the world, the sole and exclusive possession of the personal property of the testatrix, except where some

local administration for the benefit of creditors may be required, is logically unsound. It is an example of what the logicians term a petitio principii. The assertion is true [fol. 1327] only in the case of domiciliary administration. The very matter to be proved is implicitly taken for granted.

And finally, whatever power and authority the executors may have over the estate by the will of the testatrix, it does not follow that they can ignore the authority and the laws of the State of true domicile; nor is another state in which personal property of the decedent may be found or have its situs required by any theory of title or constructive possession in the executors to repudiate the domiciliary state.

The contention that effect should be given to the Georgia judgment on the principles of comity necessarily falls as a result of our finding that the decedent, at the time of her death, was domiciled in New York.

The decree of the court below is reversed with the direction that it enter a decree requiring Coca-Cola International Corporation to issue a certificate or certificates for the shares of stock of the corporation owned by Julia M. Hungerford, at the time of her death, to the appellant.

Richards, J., dissenting.

Rodney, J., by reason of illness, took no part in the decision.

[fol. 1328] IN SUPREME COURT OF DELAWARE

[Title omitted]

MOTION FOR REARGUMENT

Now Come Julian Riley and Hughes Spalding, Executors of Julia M. Hungerford, Deceased, by their Solicitors, and respectfully move that the above cause be reheard and re-[fol. 1329] considered by the Court for the following reasons:

I

The Court failed to give full faith and credit to the judgment of the Court of Ordinary of Fulton County, Georgia, probating the Will and qualifying the Executors, as required by Article IV, Section 1, of the Federal Constitution, because

(A) The Court should not have considered any evidence as to domicile but should have decided the case solely upon the basis of the exemplified copy of the record of the Georgia judgment. Evidence as to domicile, on behalf of the Executors, was received without prejudice to the Executors' contention that the Court had no right to enter upon an inquiry as to domicile, and like evidence on behalf of the Administrator c.t.a. was received subject to objection by the Executors that such evidence was inadmissible in that any decision based thereon would deny that full faith and credit to which the Georgia judgment was entitled under Article IV, Section 1, of the Federal Constitution. In holding that the Georgia judgment was not controlling, the Court's opinion is based fundamentally and essentially upon the Court's finding of fact respecting domicile, but the Court had no right, under Article IV, Section 1, of the Federal Constitution, to enter upon the inquiry or to make the finding.

(B) The judgment of the Court of Ordinary of Fulton County, Georgia, established the title of the Executors to the stock in question in a proceeding in which all parties interested in the succession were before the Court, having been personally served, and the judgment of the Court of Ordinary was affirmed by the Supreme Court of Georgia, holding the issue of the testate's domicile was an essential issue in the probate of the Will and the qualification of the Executors named therein.

[fol. 1330] (C) The effect of the Georgia judgment was to draw to the Court of Ordinary of Fulton County, Georgia the full possession, custody and right of control of all personal property of the Estate, wherever situated, through the Executors as officers of that Court, and to vest title to all of such personal property of the Estate, wherever situated, in the Executors as such officers of that Court, subject only to a right of local administration which was not claimed in this State. The opinion misconceives the foundation for this principle. That the Georgia administration is domiciliary is not "implicitly taken for granted", but was established by a judgment in a proceeding in Georgia in which all parties interested in the succession were personally served and were before the Court. That judgment was affirmed by the Court of last resort of the State of Georgia, which Court

held that the jurisdiction of the Fulton Court of Ordinary depended upon its finding that decedent was domiciled in Fulton County at the time of her death. By virtue of said right of exclusive possession and control no question of privity or lack of privity between the Executors and the Administrator c.t.a. can be considered.

II

The opinion, while reaffirming the well established rule in this State concerning the effect of findings of fact by the Chancellor, does not follow that rule. The opinion treats the rule as inapplicable to this case "because a large part of the testimony was not presented orally"; but the case was essentially one heard on oral testimony before the Chancellor. Both sides presented their most important [fol. 1331] testimony orally before the Chancellor. The taking of depositions is not unusual and furnishes no reason for a departure from the rule. The opinion upsets the well established rule in this State.

III

The opinion misconceives the facts and misapplies the law with respect to burden of proof. The opinion overlooks the fact that the evidence amply shows Hungerford's residence in Georgia, and the presumption growing out of his residence in New York before his marriage was thus amply rebutted. The Executors therefore sustained the burden of proof. The Chancellor held that the evidence on behalf of the Executors was not overcome by the testimony on behalf of the Administrator c.t.a., and accordingly made a finding of residence in Georgia. That finding is fully supported by the record.

IV

The opinion misconceives what the Chancellor decided concerning Hungerford's alleged intention to return to New York. The Chancellor did not reach

[fol. 1332] "the conclusion that Mr. Hungerford's intention to return to New York was so uncertain and indefinite that his domicile in Georgia must be inferred."

The Chancellor made no finding of an intention to return to New York; nor did he hold that "his domicile in Georgia

must be inferred" because of an uncertain and indefinite intention of returning to New York:

V

In making a finding of domicile in New York the opinion misconceived and misinterpreted the effect of testimony referred to in the opinion concerning Mrs. Hungerford's tax returns, concerning Mrs. Hungerford's foot ailment, concerning Mr. Hungerford's club memberships, concerning the improvements to the Georgia home for sale in 1933, concerning Mr. Hungerford's business activities and concerning what the opinion describes as the "enforced" stay in Atlanta.

Wherefore the Executors pray that a reargument should be granted.

Respectfully submitted. James A. Branch, Dan
[fol. 1333] MacDougald, Aaron Finger, Solicitors for Executors.

[fol. 1334] IN SUPREME COURT OF DELAWARE

[Title omitted]

ORDER DENYING MOTION FOR REARGUMENT—December 12, 1940

And Now, To Wit, this 12 day of December, A. D. 1940, the motion for rehearing and reargument filed in the above entitled cause by Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, Deceased, one of the Respondents Below, Appellee, having been duly considered by the Court, it is

Ordered By The Court that the said motion be and it is hereby in all respects denied.

Daniel J. Layton, C. J., Charles S. Richards, J., F. L. Speakman, J., Charles L. Terry, Jr., J.

[fol. 1335] IN SUPREME COURT OF DELAWARE

[Title omitted]

STIPULATION AS TO STOCKS TO BE DEALT WITH BY DECREE

And now, to-wit, this Fifth day of February, A. D. 1941, it is hereby stipulated by and among the solicitors for the

respective parties in the above entitled cause that the shares of stock now constituting the subject matter in litigation in the above entitled cause, and to be dealt with in the Decree of this Court to be entered in this cause, and to be issued by Coca-Cola International Corporation to The New York Trust Company, Administrator c. t. a. of the Estate of Julia [fol. 1336] M. Hungerford, Deceased, pursuant to the decree of this Court, shall be the following:

626 shares of the Common Stock of Coca-Cola International Corporation

300 shares of the Class A stock of Coca-Cola International Corporation.

Hugh M. Morris, Alexander L. Nichols, Solicitors for the Coca-Cola International Corporation. C. A. Southerland, Solicitor for The New York Trust Company as Administrators c. t. a. of the Estate of Julia M. Hungerford, Deceased, Aaron Finger, Solicitor for Julian Riley and Hughes Spalding as Executors of The Estate of Julia M. Hungerford, Deceased.

[fol. 1337] IN SUPREME COURT OF DELAWARE

THE NEW YORK TRUST COMPANY, a Corporation of the State of New York, as Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, One of the Respondents Below Appellant,

vs.

JULIAN RILEY and HUGHES SPALDING, as Executors of the Estate of Julia M. Hungerford, Deceased, One of the Respondents Below Appellee,

and

COCA COLA INTERNATIONAL CORPORATION, a Corporation of the State of Delaware, Complainant Below Appellee

THE NEW YORK TRUST COMPANY, a Corporation of the State of New York, as Temporary Administrator of the Estate of Julia M. Hungerford, Deceased, One of the Original Respondents Below, Appellee

DECREE—February 14, 1941

And now, to-wit, this 14th day of February A. D. 1941, the above cause having been duly argued by counsel for the

parties respectively, and having been duly considered by the Court, and the form of this decree having been submitted by counsel for the Appellant, and having been approved as to form by counsel for the appellees;

[fol. 1338] And it Appearing to the Court here that the Court of Chancery of the State of Delaware, in and for New Castle County erred in said cause in entering a decree in favor of the Appellees, Julian Riley and Hughes Spalding, as Executor of the Estate of Julia M. Hungerford, and in entering a decree granting the prayers for relief as set forth in their answer in the nature of a Bill of Complaint, whereas said decree should have granted to the Appellant the relief prayed for in its answer and should have denied the prayers for relief sought by the Appellees;

It is, Therefore, Ordered, Adjudged and Decreed that the said decree of said Court of Chancery entered on November 8, 1939, and as amended on December 6, 1939, be and it is hereby reversed and set aside; and that a decree be entered in said cause in said court in favor of the New York Trust Company, a corporation of the State of New York, Administrator C. T. A. of the estate of Julia M. Hungerford, deceased, and against Julian Riley and Hughes Spalding, executors of the Estate of Julia M. Hungerford, deceased, the Appellees adjudging and decreeing as follows:

(a) Julia M. Hungerford was domiciled in the County [fol. 1339] and State of New York at the time of her death, on or about November 28, 1935, the administration proceedings had with reference to the Estate, Julia M. Hungerford, in the Surrogate's Court of New York County, New York, within the New York Trust Company, was appointed administrator C. T. A. was a general or domiciliary Administration, and the New York Trust Company, as Administrator C. T. A. upon duly qualifying pursuant thereto, and in particular pursuant to the judgment of April 26, 1938, succeeding to the title of Julia M. Hungerford, to the shares of stock originally constituting the subject matter in this litigation, to wit, 626 shares of Class A stock and 626 shares of Common Stock of the Coca Cola International Corporation (the shares of stock now in controversy in this cause, under the stipulation dated February 5, 1941, filed in this Court, being 300 shares of the Class A stock and 626 shares of the Common stock of said Corporation) and the said Julian Riley and Hughes Spalding, as executors of the

Estate of Julia M. Hungerford, deceased, have no interest or claim in, to or against the aforesaid 300 shares of the Class A stock and 626 shares of the Common Stock of the Coca Cola Internation- Corporation; and the judgment [fol. 1340] probating the will of the late Julia M. Hungerford, in the State of Georgia, on the 6th day of January, 1936, and the qualification of the executors by virtue of the probate of the said will and pursuant to the proceedings had therein in the State of Georgia, set out in the pleadings herein, does not operate as a general or domiciliary probate since, as found by this court, the decedent was not domiciled in Georgia, and the said judgment in the State of Georgia did not operate to vest title to the said shares of stock in said executors as successors thereto of Julia M. Hungerford, deceased, or give said executors the right to administor the same as the domiciliary representatives of said estate.

(b) The proceedings has before the Court of Ordinary of Fulton County, State of Georgia, the Superior Court of Fulton County, State of Georgia, and before the Supreme Court of the State of Georgia, in the matter of the probate of the Will if Julia M. Hungerford, and in the matter of the appeal of Robert Hungerford, Appellant, vs. Hughes Spalding and Julian Riley, propounders of and Executors under the alleged last Will and Testament of Julia M. Hungerford, Appellees, which said proceedings are described and set forth in the pleadings filed in the Court Below, [fol. 1341] insofar as any judgment or decree in the said proceedings adjudicates or attempts to adjudicate the domicile of the said Julia M. Hungerford, at and immediately prior to the time of her death, are not binding upon or conclusive against the said The New York Trust Company, Administrator C. T. A. as aforesaid, Appellant herein, and the said The New York Trust Company, Administrator C. T. A. as aforesaid, is not concluded or estopped by any finding or findings in the said proceedings respecting the domicile of the said Julia M. Hungerford at and immediately prior to the time of her death.

(c) The Chancellor is directed to enter an order and decree requiring and commanding Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, deceased, to deliver to Coca Cola Internation- Corporation certificates representing 300 shares of Class A Stock and 626 shares of Common Stock of Coca Cola Internation- Cor-

poration, endorsed in blank, with certificate annexed thereto of the Court or Ordinary of Fulton County, State of Georgia, evidencing the unrevoked appointment and qualification of said persons as Executors, as aforesaid, and [fol. 1342] further requiring and commanding Coca Cola Internation- Corporation, upon receipt of said certificates, to issue and deliver to the New York Trust Company, Administrator C. T. A. of the estate of Julia M. Hungerford, deceased, certificates of stock in the name of the said Administrator, evidencing the title of the said Administrator to the said 300 shares of Class A Stock and 626 shares of Common stock of the Coca Cola Internation- Corporation. The said decree shall also provide that upon compliance ther-with, Coca Cola Internation- Corporation shall be forever discharged from all liability with respect to said shares of stock to Julian Riley and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, deceased, or to any person or persons holding or claiming under or through them, and shall also be discharged from all liability with respect to said shares of stock to the New York Trust Company, Administrator C. T. A. as aforesaid, or to any person or persons holding or claiming under or through it, insofar as concerns any cause of action asserted in the pleadings in the above cause, and

It is Further Ordered, that any dividends which may be declared and become payable upon said 300 shares of Class [fol. 1343] A stock and 626 shares of Common Stock between the date of this decree and the date of transfer of said shares of stock to the New York Trust Company, Administrator C. T. A. pursuant to the decree of the Court of Chancery as hereinbefore directed, shall be held by Coca Cola Internation- Corporation and by it paid over to the said, The New York Trust Company, Administrator C. T. A. as aforesaid, at the time of the transfer to the said, The New York Trust Company of said shares. Said payment of any dividends so accrued on said shares of stock or any thereof shall relieve and discharge Coca Cola International Corporation from all liability to any of the parties hereto or any person claiming through or under them, or any of them, with respect to any such dividends, and the order or decree of the Court of Chancery as hereinbefore directed shall contain a suitable provision to that effect.

And Further, that the said Appellees, Julian Riley and Hughes Spalding, Executors of the Estate of the said Julia

M. Hungerford, pay the costs of this cause in this Court, [fol. 1344] hereby taxed at the sum of — and the costs in said cause in said Court of Chancery;

And Further, That the clerk of this court remit to the said Court of Chancery of the State of Delaware, in and for New Castle County, a duly certified copy of this decree with the opinion of this court filed in this cause, together with a certified copy of the stipulation of counsel for the respective parties dated February 5th, 1941, and filed in this cause, in order that such further proceedings may be had in said cause in said court in conformity with this decree and the opinion, and said stipulation of counsel, as may be necessary.

And the Court being advised that the said Appellees, Julian Riley and Hughes Spalding, Executors as aforesaid, desire and intend to make application to the Supreme Court of the United States for a writ of Certiorari to review the judgment and decree of this court in this cause,

It Is Further Ordered, that the mandate of this court to the said court of Chancery in and for New Castle County, and the remitting to said Court of a certified copy of this [fol. 1345] decree with the opinion of this Court and said stipulation of counsel filed in this cause, shall be and they are hereby stayed for a period of ninety days from this date; and if within the said period of ninety days there shall be filed with the clerk of this Court a certificate from the Clerk of the Supreme Court of the United States to the effect that there has been filed in that court the certiorari petition, record and brief, and proof of notice thereof as required by the Supreme Court, the stay of the mandate of this Court and of the remitting of the said certified copy of this decree with the opinion of this Court and said stipulation of counsel shall continue until final disposition of the cause by the Supreme Court; and

It Is Further Ordered, that if there shall be filed in this court a copy of an order by the Supreme Court denying the writ applied for, the mandate of this court shall be issued and the provisions of this decree respecting the remitting to the said Court of Chancery of a certified copy of this decree with the opinion of this court and said stipulation [fol. 1346] of counsel filed in this cause shall be forthwith carried out.

Daniel J. Layton, C. J. Charles S. Richards, J. J. L. Speakman, J. Charles L. Terry, Jr., J.

[fol. 1347] IN SUPREME COURT OF DELAWARE

[Title omitted]

MOTION AS TO TAXATION OF COSTS—January 29, 1941

Now Comes The New York Trust Company, a Corporation of the State of New York, as Administrator c. t. a. of the Estate of Julia M. Hungerford, Deceased, the appellant above named, by its solicitors, C. A. Southerland, Daniel O. Hastings, Caleb R. Layton, III, and Paul Leahy, Esqrs., and represents to the Court as follows:

[fol. 1348] 1. On October 29, 1940, this Court rendered its opinion in favor of the appellant, reversing the decree of the Court below.

2. The costs of printing the record on appeal amounted to $1669.29, and said amount has been paid by appellant, as shown by the affidavit of one of the appellant's counsel hereto attached and marked Exhibit "A".

3. The appellant has paid to the Register in Chancery in and for New Castle County the sum of $330.75 for preparing and certifying the transcript of the record, which was transmitted to this Court, as required by the rules of this Court, and said Register has certified to this Court the expenses of preparing and certifying the record in accordance with Rule 13 of this Court.

4. The remaining costs on appeal amount to $—.

Wherefore, the appellant moves that costs in this case be taxed in its favor and against the appellees above named, in the amount of $2,000.04, which sum includes the amount paid by appellant for printing the record, the amount paid to the Register in Chancery in and for New Castle County for preparing and certifying the transcript of the record, [fol. 1349] and other costs in the amount of $—; and appellant further moves that the Clerk of this Court be directed to insert the said amount, to-wit, $—, in the body of the mandate to be sent to the Court below.

——— ———, ——— ———, ——— ———, ——— ———, ——— ———,
Solicitors for Appellant.

January 29, 1941.

16—4002

[fol. 1350] EXHIBIT A TO MOTION

IN SUPREME COURT OF DELAWARE

[Title omitted]

STATE OF DELAWARE,
New Castle County, ss:

[fol. 1351] Be it Remembered, that on this 29th day of January, A. D. 1940, personally appeared before me, the undersigned, a Notary Public for the State and County aforesaid, Daniel O. Hastings, who being by me duly sworn according to law did depose and say:

That he is a member of the Bar of the State of Delaware and has been duly admitted to practice in the Supreme Court of the State of Delaware; that he was and is one of the attorneys for the appellant in the foregoing cause; that he duly paid to the Star Publishing Company the sum of $1,669.29 for the printing of the record filed in the above entitled cause; that attached hereto is a true and correct copy of the receipted bill of said company for said sum; that he also paid to the Register in Chancery the sum of $330.75, the cost of preparing and certifying the record in accordance with Rule 13 of this Court, as appears from the copy of his check to the order of the Register for said sum.

—— ——.

Sworn to and Subscribed before me the day and year aforesaid. —— ——, Notary Public.

[fol. 1352] Wilmington, Delaware

Printing Designing
Engraving Embossing

Hastings, Stockly and Layton, Industrial Trust Bldg., Wilmington, Dela.

To The Star Publishing Company, Dr.

The Star Building, 309 Shipley Street

General Printers and Publishers of The Sunday Star

Feb. 1940.

To printing 50 copies record in case of the New York Trust Company, as administrator c. t. a. of the estate of Julia M. Hungerford, deceased, one of the respondents below, appellant vs. Julian Riley and Hughes Spalding, executors, etc. Two volumes, 1282 pages State Supreme Court Brief, The New York Trust Co. etc. adm. c. t. a. of estate of Julia M. Hungerford, deceased one of respondents below, appellant vs. Julian Riley and Hughes Spalding, executors, etc. one of the respondents below, appelle- and Coca Cola Int. Corp. etc. complainant below appelle-, Brief of New York Trust Company $1,854.76

Less 10% 185.47

$1,669.29

Star Publishing Co., Paid. Feb. 9, 1940. Per MAD. Thank You.

[fol. 1353] Duplicate Receipt

In the Court of Chancery of the State of Delaware, in and for New Castle County

Costs in the Court of Chancery

Due from December 13, 1940. Payable to Anthony F. Emory, Register.

Received of D. O. Hastings, Esquire for Record in re: Coca-Cola International Corporation v. The New York Trust Company, et al. $330.75

12/13/40. Duplicate Receipt.

Received Payment. Anthony F. Emory, Register in Chancery.

[fol. 1354] Copy of Check

Law Offices, Industrial Trust Building

Wilmington Trust Company

No. 5162

Wilmington, Del.,
Dec. 21, 1939.

Pay to the Order of Anthony F. Emory, Register in Chancery $330.75, The Sum * * * $330 and 75 cts. Dollars.

Daniel O. Hastings.

Daniel O. Hastings, Ayres J. Stockly, C. Edward Duffy, Caleb R. Layton, 3rd.

For Deposit to credit of Anthony F. Emory. Register in Chancery.

Received Payment Dec. 28, 1939. 4 Farmers' Bank of the State of Delaware, Wilmington, Del.

[fol. 1355] In Supreme Court of Delaware

[Title omitted]

Order as to Costs—February 14, 1941

And Now, to-wit, this 14th day of February, January, A. D. 1941, the foregoing motion having been presented to, read, and maturely considered by the Court,

It Is Ordered, Adjudged and Decreed that the costs in this case be, and the same hereby are taxed in favor of The New York Trust Company, a corporation of the State of New [fol. 1356] York, as Administrator c. t. a. of the Estate of Julia M. Hungerford, the appellant, and against the appellees above named in the amount of $2,000.04, which sum includes the amount paid by the appellant for printing the record, the amount paid by it to the Register in Chancery in and for New Castle County for preparing and certifying the transcript of the record, and other costs in the amount of $20.34; and

It Is Further Ordered, Adjudged and Decreed that the Clerk of this Court be and he hereby is directed to insert

the said amount, to-wit, $2034.38, in the body of the mandate to be sent to the Court below.

——, Chief Justice; ——, ——, Associate Judges.

[fol. 1357] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1358] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

[Title omitted]

STIPULATION AS TO PRINTING THE RECORD, FOR USE IN CONNECTION WITH THE PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Counsel for the parties in the above stated cause hereby stipulate as follows:

The petitioners above named having indicated their intention to apply to the Supreme Court of the United States for writ of certiorari to the Supreme Court of the State of Delaware to review the decision of said Supreme Court of the State of Delaware in the case sounding in said Court as follows: No. 2, January Term, 1940, The New York Trust Company, as Administrator c. t. a. of the Estate of Julia M. Hungerford, deceased, vs. Julian Riley and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, deceased, and Coca Cola International Corporation; The New York Trust Company, as Temporary Administrator of the Estate of Julia M. Hungerford, and [fol. 1359] certain portions of the record, as hereinafter indicated, being deemed not essential to a consideration of the questions to be presented by the petition for the writ, the said portions as indicated below shall be omitted from the printed record, to-wit:

The following portions of the two volumes of the printed record in the Supreme Court of Delaware:

a) All of the index covering pages I to XIV in volume one.

b) All of pages 17 through 25, both inclusive, of the printed record, and so much of page 26 as appears prior to the entry dated "May 15, A. D. 1936".

c) All of pages 83 through 132, both inclusive.

d) All of pages 184 through 187, both inclusive.

e) All of pages 202 through 224, both inclusive, and that part of page 225 ending with the words "filed in office this the 4th day of June, 1936. C. M. Paschal, Deputy Clerk".

f) All of pages 242 through 318, both inclusive.

g) All of page 371 commencing with the third paragraph on said page beginning with the words: "August 24, A. D. 1938", and all of pages 372 through 496, both inclusive.

h) All of pages 557 through 680, both inclusive.

i) All of that part of page 684 following the fourteenth line on said page, which fourteenth line reads: "Mr. Southerland: I have no objection to that", and all of pages 685 through 842, both inclusive.

[fol. 1360] j) All of pages 845 through 1267, both inclusive.

This the 12th day of April 1941.

Richards, Layton & Finger, Attorneys for Julian Riley and Hughes Spalding, Executors of the Will of Julia M. Hungerford, Deceased. Clarence A. Southerland, Paul Leahy, Attorneys for The New York Trust Company, as Administrator c. t. a. of the Estate of Julia M. Hungerford. Clarence A. Southerland, Paul Leahy, Attorneys for The New York Trust Company, Temporary Administrator of the Estate of Julia M. Hungerford. Hugh M. Morris, Alexander L. Nichols, Attorneys for Coca Cola International Corp.

[fol. 1361] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 26, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Delaware is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 81

JULIAN RILEY and HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

and

COCA-COLA INTERNATIONAL CORPORATION,

and

THE NEW YORK TRUST COMPANY, TEMPORARY ADMINISTRATOR OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE AND SUPPORTING BRIEF

DAN MACDOUGALD,
JAMES A. BRANCH,
ROBERT S. SAMS,
Atlanta, Georgia;

AARON FINGER,
Wilmington, Delaware,
Attorneys for Petitioners.

Of Counsel:
MACDOUGALD, TROUTMAN & ARKWRIGHT,
Atlanta, Georgia.
RICHARDS, LAYTON & FINGER,
Wilmington, Delaware.

INDEX

Page

PETITION FOR WRIT OF CERTIORARI

I Summary and Short Statement of matter involved 2
II Jurisdiction of this Court 5
How and when the Federal question was raised 6
III The question presented 7
IV Reasons relied on for the allowance of the writ 7
Prayer for writ 9

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions of the Courts below 11
Jurisdiction 11
Statement of the case 11
Specification of errors 11
Summary of argument 12

Argument:

1. The Georgia judgment was rendered by a court which had jurisdiction over the subject matter and also jurisdiction over the parties by personal service 12

2. Since all persons who could have any possible interest in the succession were parties to the Georgia judgment, that judgment was binding upon all the world in any contest relating to the succession to the title to any personalty of decedent 12

3. The litigation in the Delaware courts involved the succession to the title to personalty of the decedent, consisting of shares of stock of a Delaware corporation. The Georgia judgment was therefore conclusive and entitled to full faith and credit in the Delaware courts 12

Page

4. The Delaware courts did not give full faith and credit to the Georgia judgment by readjudicating the question of decedent's domicile (over the objection of the Executors) in a contest involving nothing more than the succession to the title to assets of decedent 13

The Supreme Court of Georgia had held that the jurisdiction of the Georgia courts depended upon a determination of the factual issue of domicile and that the court had jurisdiction to determine that issue 14

5. Where a court's jurisdiction depends upon a particular fact and the court determines that factual question, the parties are bound and the judgment is entitled to full faith and credit in other states 14

6. The Georgia judgment was binding on the New York Administrator in a contest in Delaware for succession to the title to personalty of the decedent, although the New York Administrator was not a party to the judgment, because

(a) The New York Administrator was not entitled to be a party; 15

(b) A party to the Georgia proceeding could not have an administrator appointed in New York, in *ex parte* proceedings, during the progress of the Georgia proceeding, and thereby in effect nullify, in other States, the decision of the Georgia courts upon the factual issue of domicile; 15

(c) The New York Administrator acquired no interest in the succession above and unrelated to the interests of a distributee and neither the State of New York nor anyone else claiming as a creditor is affected by the finding of a domicile in the Georgia proceeding; 15

Page

(d) Since a creditor is not entitled to be heard on the probate of a will, he cannot, after the succession has been determined, dispute the title or right of possession of the personal representative whose title has been established in the probate proceeding; 15

(e) Since the Georgia judgment is binding upon all possible distributees, it is also binding on the New York Administrator as representative of the distributees, and, under the circumstances, the New York Administrator is the same person in law as decedent's husband, one of the distributees, who initiated the proceedings for the appointment of the New York Administrator, he having been a party to and participated in the Georgia litigation to its final conclusion. 16

7. The Georgia judgment determined that the Georgia administration was domiciliary and not local. Such a judgment is conclusive where all persons interested in the distribution of the estate are parties 17

8. The Delaware Supreme Court did not first determine whether the Georgia judgment was conclusive, as was its duty, but examined the question of domicile and then proceeded to hold that the New York Administrator was entitled to the stock *because of its finding of a New York domicile for decedent* 17

Conclusion 18

CASES AND TEXT CITED

	Page
Andrews v. Andrews, 188 U. S. 14	6
Baker v. Baker, Eccles & Co., 242 U. S. 394; 162 Ky. 683; 173 S. W. 109; L.R.A. 1917C, p. 171	6, 8, 13, 17
Burbank v. Ernst, 232 U. S. 162	8, 13, 17
Carpenter v. Strange, 141 U. S. 87, 103	6
Chicago, Rock Island & Pacific Rwy. Co. v. Schendel, 270 U. S. 611	16
Davis v. Davis, 305 U. S. 32	6, 9, 14
Dunsmuir v. Scott, 217 Fed. 200	16
Fischer's Est. In re, 180 Atl. 633 (N. J.)	8, 13, 17
Gibson, Lucy Haines v. Solomon, 136 Ohio St. 101, 23 N. E. (2d) 996; 125 A.L.R. 903	16
Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 334	6
Hooks v. Brown, 125 Ga. 122, 53 S. E. 583	16
Keith v. Willers Truck Service, Inc., 266 N. W. 256 (S. D.); 104 A.L.R. 1471	16
Maybin v. Knighton, 67 Ga. 103	12
Overby v. Gordon, 177 U. S. 214	8, 13, 17
Roberts v. Bathurst, 112 Fed. (2d) 543 (5 C.C.A.)	17
Schouler on Wills, Vol. 2, p. 846, Sec. 746	16
Sovereign Camp of Woodmen of the World v. Bolin, et al., 305 U. S. 66	9, 14
St. Louis-S.F.R. Co. v. Stuckwish, 137 Okla. 251; 279 Pac. 683	16
Stoll v. Gottlieb, 305 U. S. 165	6, 9, 14
Tant v. Wigfall, 65 Ga. 412	12
Thomas v. Morrisett, 76 Ga. 384	8, 13, 17
Thormann v. Frame, 176 U. S. 350	8, 13, 17
Tilt v. Kelsey, 207 U. S. 43	6, 8, 13, 16, 17
Veatch v. Rice, 131 U. S. 293	12
Willett's Appeal, In re, 50 Conn. 330	8, 13, 17

STATUTES CITED

28 U.S.C.A., Sec. 344 (b) —Sec. 237 (b), Judicial Code 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. _____

JULIAN RILEY and HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

and

COCA-COLA INTERNATIONAL CORPORATION,

and

THE NEW YORK TRUST COMPANY, TEMPORARY ADMINISTRATOR OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE AND SUPPORTING BRIEF

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, deceased, respectfully pray that a writ of certiorari issue to the Supreme Court of the State of Delaware to review a final decree of that court entered February 14, 1941. A certified transcript of the record in the case, including the proceed-

ings in the Supreme Court of Delaware, accompanies this petition in accordance with the rules of this Court.

I.

Summary and Short Statement of Matter Involved

This petition involves the question whether the Supreme Court of Delaware gave full faith and credit to a judgment of the Court of Ordinary of Fulton County, Georgia. The question arose in an interpleader suit instituted by Coca-Cola International Corporation, a Delaware corporation, against petitioners and The New York Trust Company, as Temporary Administrator by appointment of a surrogate's court in New York in *ex parte* proceedings. The interpleader suit involved the succession to a decedent's title to stock in the Delaware corporation, rival demands for a transfer of the stock having been made on the corporation by petitioners, as the Executors named in decedent's Will, and by said Administrator. There being no creditor in Delaware and no question as to local administration, the respective claimants were required to interplead between themselves as to their respective claims to the stock, consisting of 626 shares of the Class A and 626 shares of the common stock of Coca-Cola International Corporation owned by Julia M. Hungerford at the time of her death. Petitioners, in their pleading in the nature of a bill of complaint (R. 13-50, 91-112) asserted title to the stock by virtue of a judgment of the Court of Ordinary of Fulton County, Georgia, as finally affirmed by the Supreme Court of Georgia. The Georgia judgment was rendered in *inter partes* probate proceedings to which all persons interested in the succession (including decedent's husband), either as beneficiaries under the Will or as distributees in the event of intestacy, were served personally. The Georgia judgment established that decedent was domiciled in Fulton County,

Georgia, at the time of her death, admitted the Will to probate and established Fulton County, Georgia, as the seat of general or domiciliary administration of the estate. The judgment was affirmed by the Supreme Court of Georgia in an opinion holding that the probate was a general probate and that the finding of domicile was essential to the jurisdiction of the Fulton County Court of Ordinary. (*Hungerford v. Spalding*, 183 Ga. 547, 189 S. E. 2; R. 105-110).

In the probate proceedings, Hungerford (decedent's husband) filed a caveat alleging want of testamentary capacity and also that decedent was domiciled in the State of New York at the time of her death. After hearing, judgment was entered overruling the caveat, admitting the Will as duly probated in solemn form and adjudging that decedent died domiciled in Fulton County, Georgia. The Executors thereupon qualified as general or domiciliary representatives of the estate. Upon appeal by Hungerford to the Superior Court of Fulton County, Georgia (R. 40), his caveat was tried de novo (R. 17-18). A jury found that decedent had testamentary capacity and was domiciled in Fulton County, Georgia, at the time of her death and judgment was entered accordingly. (R. 48-49). A motion by Hungerford for a new trial was overruled (R. 95-99) and he then appealed to the Supreme Court of Georgia, which court affirmed the judgment of the Superior Court. (R. 105-110; *Hungerford v. Spalding*, 183 Ga. 547, 189 S. E. 2). The principal ground of error urged by Hungerford was that the trial court should not have made a finding as to decedent's domicile, but the Supreme Court of Georgia held, *inter alia*, that the finding was proper because the jurisdiction of the Fulton County Court of Ordinary depended upon decedent's domicile in that county at the time of her death.

While the Georgia litigation was in progress Hungerford

instituted *ex parte* proceedings in a surrogate's court in New York which resulted in the appointment of The New York Trust Company as Temporary Administrator, and after the decision of the Supreme Court of Georgia, the surrogate's court appointed The New York Trust Company as Administrator c. t. a., also in *ex parte* proceedings, following which the Administrator c. t. a. was made a party to the Delaware interpleader proceeding.

Upon final hearing in the Delaware court, petitioners introduced in evidence duly exemplified copies of the Georgia judgment and proceedings and objected to the introduction of any evidence as to decedent's domicile, on the ground that the Georgia judgment was entitled to full faith and credit and established the right and title of the Executors to the stock. The trial court admitted evidence of both sides on the subject of domicile, subject to the objection of petitioners, reserving for later decision the questions raised by petitioners as to the effect of the Georgia judgment. Subsequently the trial court filed an opinion finding that decedent died a resident of Fulton County, Georgia (R. 150-181), and that it therefore was unnecessary to pass upon the effect of the Georgia judgment, and the trial court made no decision on the question. Upon appeal by the Administrator c. t. a. to the Supreme Court of Delaware that court reversed the trial court. Instead of first determining whether the Georgia judgment permitted an inquiry into the question of domicile, the Delaware Supreme Court reviewed the evidence and reversed the trial court on the question of fact as to decedent's residence and domicile at the time of her death, holding that the evidence showed that decedent died domiciled in New York. *On the basis of that finding* the court held that the Administrator c. t. a. was entitled to the stock and that the Georgia judgment was not binding upon it on the ground that it was not a party to or in privity with

a party to the Georgia proceedings. The decision was by three justices. One justice dissented and another justice who sat during the argument did not participate in the decision. A motion for reargument (R. 232-235) urging that the court's decision would deny full faith and credit to the Georgia judgment was overruled without opinion and a final decree was entered on February 14, 1941 (R: 235-240).

II.

Jurisdiction of This Court

The basis of this Court's jurisdiction is Section 237 (b) of the Judicial Code (28 U.S.C.A., Sec. 344 (b)). The decree of the Supreme Court of Delaware sought to be reviewed was entered February 14, 1941 (R. 236-240); and this petition is filed within three months from the date of that decree.

The question involved is substantial because the Georgia judgment established the title of the Executors to the stock in question, valued at more than half a million dollars, and the effect of the Delaware decision was a denial of the Executors' title, although protected by and especially set up and claimed under the Constitution of the United States. The question involved is also of general importance and substantial because the effect of the Delaware decision is that there can be no final determination of the succession or of the question of whether an administration is general and domiciliary or local even though all persons interested in the succession are personally before a court having jurisdiction of the subject matter. The Delaware decision permits a dissatisfied litigant in such a proceeding to have an administrator appointed in *ex parte* proceedings in another state, and thereby prevent the judgment in the first state, to which he is a party, from being given full faith and credit

in a third state where assets of the decedent are located. A ruling by this Court would furnish a substantial contribution to the law governing the administration of estates where the full faith and credit clause of the Federal Constitution is involved. The jurisdiction of this Court to review the federal question decided by the Supreme Court of Delaware is sustained by the following cases:

Andrews v. Andrews, 188 U. S. 14
Carpenter v. Strange, 141 U. S. 87, 103
Baker v. Baker, Eccles & Co., 242 U. S. 394
Tilt v. Kelsey, 207 U. S. 43
Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 334
Davis v. Davis, 305 U. S. 32
Stoll v. Gottlieb, 305 U. S. 165

How and When the Federal Question Was Raised

The federal question was raised in petitioners' pleading (R. 13-50, 91-112); in a motion by petitioners for a decree notwithstanding answer (R. 115-116), at the trial in the Chancery Court before any evidence on domicile was offered (R. 186, 188, 190, 197, 199), objection to such evidence having been made applicable to all evidence on the subject (R. 199) and the Chancellor reserving the question of the effect of the Georgia judgment and therefore of the admissibility of such evidence for later determination; in petitioners' briefs in the Supreme Court of Delaware; and on motion for reargument in the Delaware Supreme Court (R. 232-235). The Delaware Chancellor before whom the case was tried did not discuss or decide the federal question. In his opinion he examined the evidence on domicile, made a finding of fact that decedent died domiciled in Georgia and stated that this rendered it unnecessary for him to consider the question of the effect of the Georgia judgment

(R. 181). The Supreme Court of Delaware in reversing the lower court, considered and decided the federal question adversely to the contention of petitioners (R. 225-232).

III.

The Question Presented

Does the decision and decree of the Delaware Supreme Court, holding that the Georgia judgment does not conclusively establish petitioners' title to the stock in question for administration as domiciliary representatives of the estate, as against the Administrator c. t. a. appointed by the New York Court in an *ex parte* proceeding, give to the Georgia judgment that full faith and credit to which it is entitled under Article IV, Section 1, of the Federal Constitution, the judgment being valid in Georgia and binding on all persons interested in the succession?

IV.

Reasons Relied On for the Allowance of the Writ

1. The Delaware Supreme Court, in violation of Article IV, Section 1, of the Federal Constitution, failed to give full faith and credit to a judgment affirmed by the Supreme Court of Georgia. That judgment conclusively established decedent's domicile against all persons entitled to be heard as to the succession to decedent's estate and thereby vested petitioners with title to the stock in question for the purpose of administration. The decision of the Delaware Supreme Court fails to give full faith and credit to that judgment in that the court re-examined the question of domicile that was conclusively determined by the Georgia judgment against all persons interested in the succession and, on the basis of a contrary determination as to decedent's domicile

(although it had no right to enter upon the inquiry), held that the Administrator c. t. a. was entitled to the stock.

2. The Delaware Supreme Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court. The effect of the Delaware decision is that where all parties interested in the succession have been brought before a court having jurisdiction of the subject matter that court cannot determine whether an administration under its supervision shall be general or local so as to establish the title of representatives who qualify to decedent's personalty wherever located. Under principles announced and applied by this Court, and in decisions of state courts some of which have been cited with approval by this Court, a court having jurisdiction of the subject matter and of all persons interested in the succession can conclusively determine whether an administration shall be general or local. Some of these decisions are:

Thormann v. Frame, 176 U. S. 350
Overby v. Gordon, 177 U. S. 214
Tilt v. Kelsey, 207 U. S. 43
Burbank v. Ernst, 232 U. S. 162
Baker v. Baker, Eccles & Co. 242 U. S. 394
Thomas v. Morrisett, 76 Ga. 384
In re Fischer's Est., 180 A. 633 (N. J.)
In re Willett's Appeal, 50 Conn. 330

Once determined in such a proceeding the judgment cannot be attacked in any other state. The effect of the Delaware decision is that a dissatisfied litigant in such a proceeding may go into another state, have an administrator appointed in *ex parte* proceedings, and, in defiance of and ignoring the previous adjudication, have the question of domicile litigated all over again in a contest between the

two sets of representatives in a third state where property of the decedent is located.

3. The right of the Delaware Court to inquire into the jurisdiction of the court rendering the Georgia judgment did not include the right to examine factual issues on which jurisdiction depended, where those issues had been determined between the real parties at interest in the court in which the judgment was rendered.

Davis v. Davis, 305 U. S. 32
Sovereign Camp of Woodmen of the World v. Bolin, et al., 305 U. S. 66
Stoll v. Gottlieb, 305 U. S. 165

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Delaware, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Delaware had in the case numbered and entitled on its docket, No. 2, January Term, 1940, The New York Trust Company, a corporation of the State of New York, as Administrator, c. t. a. of the Estate of Julia M. Hungerford, deceased, one of the respondents below, Appellant, *versus* Julian Riley and Hughes Spalding, as Executors of the Estate of Julia M. Hungerford, deceased, one of the respondents below, Appellee, and Coca-Cola International Corporation, a corporation of the State of Delaware, Complainant below, Appellee, and The New York Trust Company, a corporation of the State of New York, as Temporary Administrator of the Estate of Julia M. Hungerford, deceased, one of the original respondents below, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of

the United States and that the judgment of said Supreme Court of Delaware be reversed, and for such other relief as to this Court may seem proper.

JULIAN RILEY AND HUGHES SPALDING AS EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

Petitioners,

By DAN MACDOUGALD,
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Atlanta, Georgia;

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of Delaware is reported in 16 Atl. (2d) 772, and appears in the Record at pages 203-232. The opinion of the trial court is reported in 8 Atl. (2d) 511 and is set out in the Record at pages 150-181. The opinion of the trial court on a motion for judgment notwithstanding answer is reported in 2 Atl. (2d) 290, and appears in the Record at pages 134-143.

Jurisdiction

A full statement of the grounds on which it is claimed that this Court has jurisdiction is contained in Section II of the petition for writ of certiorari, and the same is hereby adopted and made a part of this brief.

Statement of the Case

The facts in this case are set out in Section I of the petition for writ of certiorari, and the statement there made is hereby adopted and made a part of this brief.

Specifications of Errors

The Supreme Court of Delaware erred in holding that the Georgia judgment did not conclusively establish the title of the Executors to the stock in question for administration as the domiciliary or general representatives of the estate of Julia M. Hungerford, and that such judgment was not binding on the New York Administrator in a dispute as to the title for administration to the stock of a Delaware corporation. The opinion and decree of the Supreme Court of Delaware failed to give the full faith and credit to which

the Georgia judgment was entitled in the Courts of Delaware under Article IV, Section 1, of the Constitution of the United States.

Summary of Argument

A synopsis of the argument is set forth in the index and for the sake of brevity is omitted here.

Argument

1. The court which rendered the Georgia judgment had jurisdiction

(a) over the subject matter, it being a court of general jurisdiction of matters relating to probate and to decedent's estates.

Veatch v. Rice, 181 U. S. 293
Maybin v. Knighton, 67 Ga. 103
Tant v. Wigfall, 65 Ga. 412

(b) over the parties, personal service having been obtained upon the parties thereto.

2. The Georgia judgment was binding upon all the world upon any question relating to the succession to the title to any personalty of the decedent, because the parties to the judgment include all persons who could have any possible interest in the succession.

3. The litigation in the Delaware Courts involved the question of the succession to the title to certain shares of stock. (The right of the State of New York to claim estate or inheritance taxes was not involved, and it is not contended that the Georgia judgment bars the State of New York from making any such claim, based upon an alleged domicile of the decedent in New York). The Geor-

gia judgment was therefore conclusive upon the Delaware Courts, the Executors having claimed the right to have full faith and credit accorded to the Georgia judgment as required by the Federal Constitution.

4. By examining the question of decedent's domicile and admitting evidence thereon (over the objection of the Executors), the Delaware Courts failed to give full faith and credit to the Georgia judgment because the determination by the Georgia Courts that decedent was domiciled in Georgia at the time of her death was conclusive whenever and wherever any question relating to the succession and based upon an alleged domicile elsewhere was raised.

Thormann v. Frame, 176 U. S. 350
Overby v. Gordon, 177 U. S. 214
Tilt v. Kelsey, 207 U. S. 43
Burbank v. Ernst, 232 U. S. 162
Baker v. Baker, Eccles & Co., 242 U. S. 394; 162 Ky. 683; 173 S. W. 109; L.R.A., 1917C, p. 171
Thomas v. Morrisett, 76 Ga. 384
In re Fischer's Est., 180 Atl. 633 (N. J.)
In re Willett's Appeal, 50 Conn. 380

The Georgia courts had before them all possible distributees of decedent's estate, and hence it was possible to have a single controlling decision upon the succession. This Court in *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, supra, considered the question imposed by counsel in that case as to how it would be possible to determine judicially the domicile where an intestate left personalty in different states with different laws of distribution and with possible dis-

tributees residing in different jurisdictions, and said (page 404):

> ". . . The answer is clear: Unless all possible distributees can be brought within the jurisdiction of a single court having authority to pass upon the subject-matter, either by service of process or by their voluntary appearance, it must in many cases be impossible to have a single controlling decision upon the question. . . ."

The Supreme Court of Georgia held that the jurisdiction of the Georgia Courts to render the judgment depended upon a determination of the factual issue of domicile and that the court had jurisdiction to determine that issue, saying:

> "The application alleged that the Testatrix resided in Fulton County, and, under this and other allegations made, must be construed as an application to probate the will generally as a will of a person domiciled in that County. *It was thus necessary in order to admit the will to probate to show that the decedent was domiciled in Fulton County at the time of her death; otherwise the Court of Ordinary would not have had jurisdiction.*" (R. 108; italics ours).

5. Where the jurisdiction of a court depends upon the existence of a particular fact, and the court determines that factual question, the parties to the proceeding are bound by that determination and the judgment is entitled to full faith and credit in other states.

Davis v. Davis, 305 U. S. 32
Sovereign Camp of Woodmen of the World v. Bolin, et al., 305 U. S. 66
Stoll v. Gottlieb, 305 U. S. 165

Also cases cited under Section 4, supra.

The statement of this Court in *Stoll v. Gottlieb*, supra (at page 172) is equally applicable to the present case:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

6. The Georgia judgment was binding upon the New York Administrator in the contest in Delaware involving the succession to the title to assets of the estate, notwithstanding that the New York Administrator was not a party to the Georgia proceedings and judgment, because it was not entitled to be a party thereto and all persons interested in the question of the succession were parties. When decedent's husband, himself a party to the Georgia litigation, and during the progress of the Georgia litigation, had the Administrator appointed in New York in *ex parte* proceedings, he could not thereby in effect nullify in other states, the decision of the Georgia Courts upon the factual question of domicile that was in issue and upon which the jurisdiction of the Georgia Courts depended. The New York Administrator acquired no interest in the succession over, above and unrelated to the interest of any possible distributee; and neither the State of New York nor anyone else claiming as a creditor is affected by the finding of domicile in the Georgia proceedings. A creditor or tax claimant is not entitled to be heard on the probate of a will and hence, after the succession has been determined, cannot dispute the title or right of possession of the personal rep-

resentative whose title has been established in the probate proceeding.

Hooks v. Brown, 125 Ga. 122; 53 S. E. 583
Dunsmuir v. Scott, 217 Fed. 200
Tilt v. Kelsey, 207 U. S. 43
Schouler on Wills, Vol. 2, p. 846, Sec. 746

It follows therefore that, since the Georgia judgment is binding upon all possible distributees, including Hungerford because he was a party to and participated in the Georgia litigation, it is also binding upon the New York Administrator as representative of the distributees. Under the circumstances, the New York Administrator is the same person in law as Hungerford. In *Chicago, Rock Island & Pacific Rwy. Co. v. Schendel*, 270 U. S. 611, this Court refused to distinguish between the widow and sole heir, and the administrator, holding the latter was bound by a judgment to which the former was a party, on the ground that they were in legal effect the same. Said this Court, (page 620):

> "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different. Bigelow on Estoppel, 6th ed. 145; and parties nominally different may be, in legal effect, the same."

Citing and following the *Schendel* case are:

Keith v. Willers Truck Service, Inc., 266 N. W. 256 (S. D.); 104 A. L. R. 1471
Lucy Haines Gibson v. Solomon, 136 Ohio St. 101; 23 N. E. (2d) 996; 125 A. L. R. 903
St. Louis-S. F. R. Co. v. Stuckwish, 137 Okla. 251; 279 Pac. 683

Directly in point are the cases of:

Thomas v. Morrisett, 76 Ga. 384
In re Willett's Appeal, 50 Conn. 330
In re Fischer's Estate, 180 Atl. 633 (N. J.)

This Court recently denied certiorari in *Roberts v. Bathurst*, 112 Fed (2d) 543 (5 C. C. A.), being a case almost identical in principle with the instant case and which held that the personal representative had no independent status from that of sole beneficiary, and that a judgment binding on the sole beneficiary was binding upon the Administrator.

7. The Georgia judgment determined that the Georgia administration was domiciliary and general and not ancillary or local. Such a judgment is conclusive where all persons interested in the distribution of the estate are parties to the judgment.

Thormann v. Frame, 176 U. S. 350
Overby v. Gordon, 177 U. S. 214
Tilt v. Kelsey, 207 U. S. 43
Burbank v. Ernst, 232 U. S. 162
Baker v. Baker, Eccles & Co., 242 U. S. 394; L. R. A. 1917C, 171
Thomas v. Morrisett, 76 Ga. 384
In re Fischer's Estate, 180 Atl. 633 (N. J.)
In re Willett's Appeal, 50 Conn 330

8. The Delaware Supreme Court lost sight of the fact that its first duty was to determine whether it had the right to enter upon an inquiry as to domicile if it was to give full faith and credit to the Georgia judgment. It nevertheless made that inquiry without determining the Federal question and, after making a finding of domicile in New York, proceeded to hold that the New York Administrator was entitled to the stock *because of its finding of a New York domicile for decedent*. In so doing, it failed to

give to the Georgia proceedings the full faith and credit to which they are entitled.

Conclusion

The decision of the Delaware Supreme Court is of particular importance in view of the large number of corporations operating on a nation-wide scope under Delaware charters. Heretofore it has been generally recognized that the appointment of an executor by a court of competent jurisdiction wherein the domicile of the decedent was determined, and in which all persons interested in the succession were before the court, vested in the personal representative the title to shares of stock owned by the decedent and enabled such personal representative to transfer a good title thereto in the course of administration. The Delaware decision strips the Georgia judgment of the protection which it has heretofore been considered that such judgments have under the full faith and credit clause of the Federal Constitution and, if allowed to stand, will produce hardships in the administration of decedent's estates.

It is respectfully submitted, therefore, that the petition for writ of certiorari should be granted.

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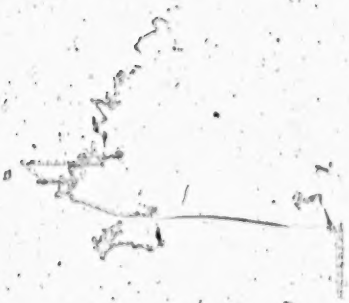

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940

No. 1043

JULIAN RILEY AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

REPLY BRIEF OF PETITIONERS FOR CERTIORARI.

DAN MACDOUGALD,
JAMES A. BRANCH,
ROBERT S. SAMS,
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INDEX.

Cases Cited.

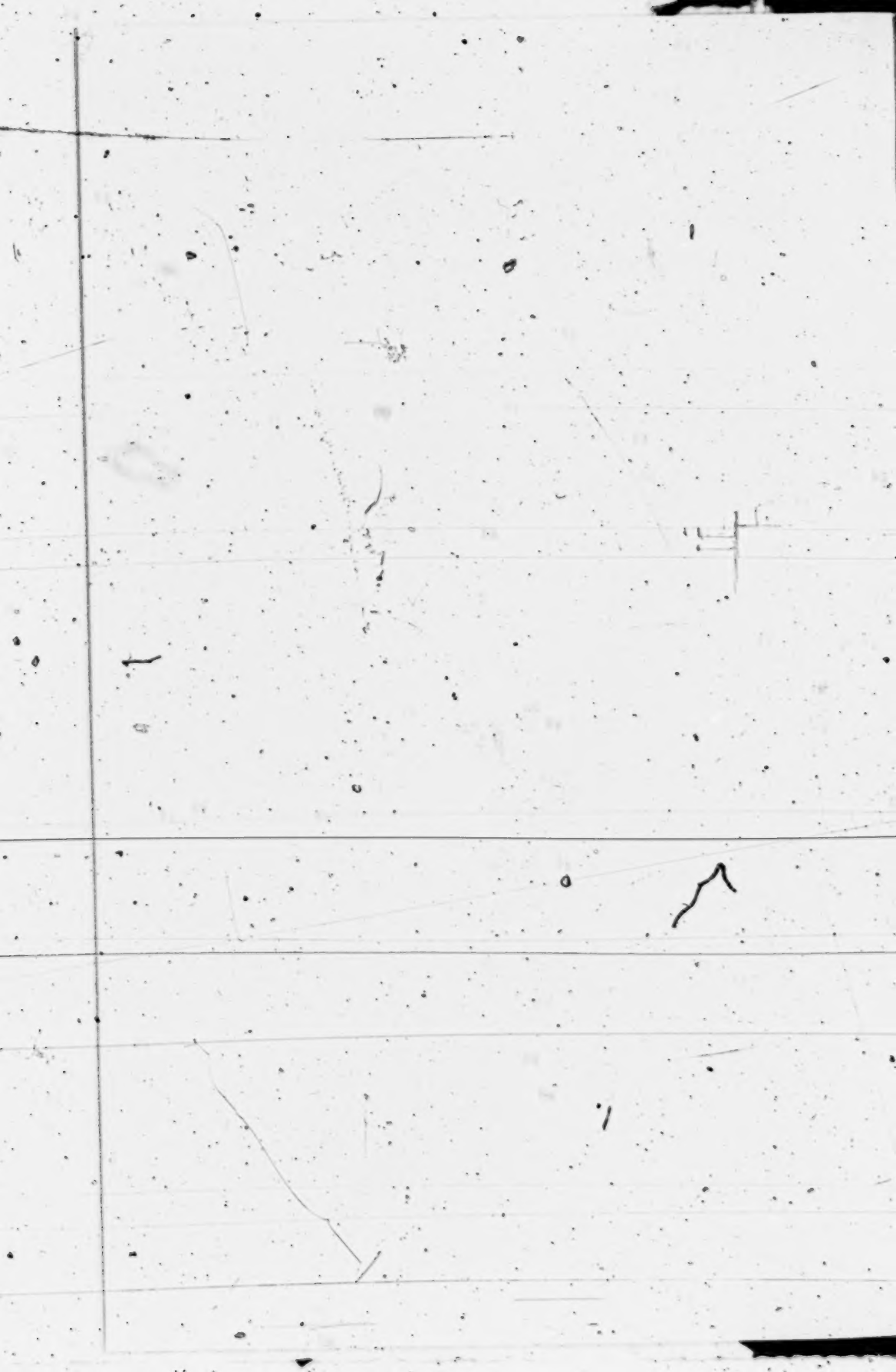
	Page
Baker v. *Baker, Eccles & Co.*, 242 U. S. 384	4
Buchan v. *Williamson*, 142 Ga. 198, 82 S. E. 548	2
Chicago, Rock Island & Pacific Rwy. Co. v. *Schendel*, 270 U. S. 611	2
Fisher's Estate, In re, 180 Atl. 673	5
Overby v. *Gordon*, 177 U. S. 214	5
Thomas v. *Morrisett*, 76 Ga. 384	2
Thormann v. *Frame*, 176 U. S. 350	5
Willett's Appeal, In re, 50 Conn. 330	5

Statute Cited.

Georgia Code Ann., Section 113-901	3

Text Cited.

34 C. J. 1038-1039	3



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1043

JULIAN RILEY AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

and

COCA-COLA INTERNATIONAL CORPORATION,

and

THE NEW YORK TRUST COMPANY, TEMPORARY ADMINISTRATOR OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED.

REPLY BRIEF OF PETITIONERS FOR CERTIORARI.

In view of certain statements made by counsel for the Administrator in their brief in opposition to the petition for certiorari, we wish to file a short reply.

It is essential in considering the question presented to keep in mind the fact that the only issue before the Dela-

ware court was the succession to the title of the shares of stock owned by decedent. No claims for estate or inheritance taxes or any rights of any creditors were before the court. It is not a bill to marshal the assets of the estate to pay the creditors or to distribute the same.

I.

Counsel for the Administrator, on page 3 of their brief, assert that a judgment against the heirs or distributees is not *res adjudicata* as to the personal representative, and in a footnote numerous cases are cited, among which is the case of *Buchan* v. *Williamson*, 142 Ga. 198, 82 S. E. 548. This statement is misleading if it is intended to convey the idea that such is the rule where the succession only is involved or where a right is being asserted solely on behalf of the distributee which has been previously determined against such distributee or to controvert the rule that identity of parties is a matter of substance and not of form.

Chicago, Rock Island & Pacific Rwy. Co. v. *Schendel*, 270 U. S. 611.

(See page 16 of our main brief.)

It is doubly misleading if it is intended by the citation of the case of *Buchan* v. *Williamson* to create the idea that the Supreme Court of Georgia has ever so held. On the contrary, that court, in the case of *Thomas* v. *Morrisett*, 76 Ga. 384, held exactly the opposite. In that case, cited in our brief in support of the petition for writ of certiorari, the succession was determined by probate proceedings in Alabama in which all of the distributees were before the court. The domicile of the decedent was determined to be in Alabama. While that judgment was being appealed by certain of the heirs to the Supreme Court of Alabama, these heirs, residents of Georgia, instituted *ex parte* administration proceedings in the State of Georgia upon the ground

that decedent at the time of her death was a resident thereof. An administrator was appointed and took possession of certain personal property having a situs in the State of Georgia. The judgment of probate was affirmed by the Alabama Supreme Court and the executor applied to the *ex parte* administrator in Georgia to turn over the assets of the estate in his hands which the Supreme Court of Georgia ordered be done, holding that the administrator appointed in Georgia was bound by the judgment of probate in Alabama, although not a party thereto.

The case of *Buchan* v. *Williamson* involved a state of facts totally different. A suit was instituted by the heirs to recover a parcel of land. There was no personal representative qualified to sue. An administrator was later appointed. Under the laws of Georgia, real estate is liable for the debts of the decedent (Section 113-901, Georgia Code Ann.). The administrator, thus representing both heirs and creditors, brought suit to recover the land. The Georgia Supreme Court held that the previous suit did not bind the creditors of the estate and, therefore, the administrator was not bound. All of the cases cited in the footnote, page 3 of the Administrtor's brief, are of the latter type; that is, they involve claims against the estate or proceedings to recover assets of the estate involving in both instances the rights of creditors in addition to the rights of heirs.

The discussion in *34 C. J. 1038-1039*, also cited, clearly draws the distinction between a judgment settling the succession and one involving a controversy in which creditors are interested.

At no time during the litigation have counsel for the Administrator cited any case which holds that a personal representative can challenge the succession where it has been settled in an *inter partes* proceeding, such as that leading to the Georgia judgment.

II.

Counsel for the Administrator challenge the statement that the New York Administrator was appointed in *ex parte* proceedings and seek to bind the other distributees, resident of Georgia, and the Executors by reason of notice having been served upon them in the State of their residence. This was the exact situation that existed in the case of *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394. This Court disposed of that contention in the following language:

> "But it is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment *in personam* to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound" (page 401),

and on page 403:

> "And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory."

Likewise this Court emphasized the distinction between a judgment *in rem* and a judgment *in personam* in so far as the succession was to be determined (page 400):

> "How is the fact of decedent's domicile to be judicially ascertained as a step in determining what law is to govern the distribution? Obviously, if fundamental principles of justice are to be observed, the ascertainment must be according to due process of law, that is, either by a proceeding *in rem* in a court having control of the estate, or by a proceeding *in personam* after service of process upon the parties to be affected by the judgment."

The cases cited in our main brief:

In re Fisher's Estate, 180 Atl. 673 (N. J.), and
In re Willett's Appeal, 50 Conn. 330,

are substantially similar to the case of *Thomas* v. *Morrisett*, *supra*, and the instant case. The cases of

Thormann v. *Frame*, 176 U. S. 350, and
Overby v. *Gordon*, 177 U. S. 214,

involve situations where the succession was being settled in a proceeding *inter partes*. An *ex parte* judgment of general administration was offered in evidence in each case and excluded. Certainly in view of that fact such a judgment could not challenge the title of the personal representatives as to personal property so settled in the proceeding *inter partes*.

III.

Counsel for the Administrator see no significance in the fact that the Supreme Court of Delaware first determined the question of domicile, and then proceeded to examine the effect of the Georgia judgment. Its significance is twofold: First, in the fact that the effect to be given the Georgia judgment in no way depends on the determination of the factional issue of domicile by the Delaware court. Second, in finding that the decedent was domiciled in New York at the time of her death the court consequently concluded that the administration in New York was general or domiciliary, thus ignoring the fact that the question of the state of domiciliary administration had already been conclusively determined as Georgia. It was thus assumed that the New York judgment had the same legal effect in determining the succession as the *inter partes* judgment of the Georgia court. This would have been correct had both judgments been *ex parte* as to the respective distributees thereunder.

Baker v. *Baker, Eccles & Co.*, *supra*.

But in view of the fact that the Georgia judgment was binding on all parties interested in the succession, this was a denial to that judgment of the "full faith and credit" to which it was entitled under the Constitution and laws of the United States.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 81

JULIAN RILEY and HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,
Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, ET AL,
Respondents.

BRIEF ON BEHALF OF PETITIONERS

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INDEX

	Page
Opinions Below	1
Jurisdiction of this Court	1
Statement of the Case	2
Specification of Errors	5
Summary of Argument	6
Argument:	
The Georgia Court had jurisdiction and its judgment determined the succession	8
The Delaware courts, in examining question of domicile, failed to give full faith and credit to Georgia judgment	9
Full faith and credit applies to determination of jurisdictional facts	15
Jurisdictional fact of domicile determined in Georgia proceedings	16
The Georgia judgment binding on New York Administrator	16
The Georgia judgment determined that the Georgia administration is domiciliary and not ancillary	22
Conclusion	23

CASES CITED

	Page
Baker v. Baker, Eccles & Co., 242 U. S. 394; 162 Ky. 683; 173 S.W. 109; L.R.A. 1917C; p. 171	9, 10, 13, 22
Buchan v. Williamson, 142 Ga. 198; 82 S. E. 548	18, 19
Burbank v. Ernst, 232 U. S. 162	9, 22
Chicago, Rock Island & Pacific Rwy. Co. v. Schendel, 270 U. S. 611	17, 19
Davis v. Davis, 305 U. S. 32	15
Dunsmuir v. Scott, 217 Fed. 200	17
Fischer's Estate, In re, 118 N. J. Eq. 599; 180 Atl. 633	10, 12, 14, 18, 22
Gibson, Lucy Haines v. Solomon, 136 Ohio St. 101; 23 N. E. (2d) 996; 125 A.L.R. 903	18
Hardaway v. Drummond, 27 Ga. 221	18
Hooks v. Brown, 125 Ga. 122; 53 S. E. 583	17
Hungerford v. Spalding, 183 Ga. 547; 189 S. E. 2 (R. 105-110)	3
Keith v. Willers Truck Service, Inc., 266 N.W. 256 (S.D.); 104 A.L.R. 1471	18
Maybin v. Knighton, 67 Ga. 103	8
Martin's Estate, 240 N. Y. Supp. 393; affirmed in 174 N. E. 753	20
Overby v. Gordon, 177 U. S. 214	9, 14, 22
Roberts v. Bathurst, 112 Fed. (2d) 543 (5 C.C.A.), certiorari denied 311 U. S. 709	18
Rochie v. McDonald, 275 U. S. 449	8
Sovereign Camp of Woodmen of the World v. Bolin et al, 305 U. S. 66	15
St. Louis-S. F. R. Co. v. Stuckwish, 137 Okla. 251; 279 Pac. 683	18

CASES CITED (Continued)

	Page
State of Colorado v. Harbeck, 232 N. Y. 71; 133 N. E. 357	20
Stoll v. Gottlieb, 305 U. S. 165	15
Sunshine Coal Company v. Adkins, 310 U. S. 381	15, 18
Tant v. Wigfall, 65 Ga. 412	8
Thomas v. Morrisett, 76 Ga. 384	10, 11, 14, 18, 22
Thormann v. Frame, 176 U. S. 350	9, 14, 22
Tilt v. Kelsey, 207 U. S. 43	9, 17, 22
Treinies v. Sunshine Mining Co., 308 U. S. 66	15
Veatch v. Rice, 131 U. S. 293	8
Willett's Appeal, In re, 50 Conn. 330	10, 12, 14, 18, 22

TEXTS CITED

34 C. J. 1038-1039	19
Schouler on Wills, Vol. 2, p. 846, Sec. 746	17

STATUTES CITED

28 U. S. C. A. Sec. 344 (b), Sec. 237 (b), Judicial Code	1
Sec. 113-901, Georgia Code Ann.	19
28 U. S. C. A. 687; R. S. 905	5

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BRIEF ON BEHALF OF PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Delaware is reported in 16 Atl. (2d) 772, and appears in the Record at Pages 203-232. The opinion of the trial court is reported in 8 Atl. (2d) 511 and is set out in the Record at Pages 150-181. The opinion of the trial court on a motion for judgment notwithstanding answer is reported in 2 Atl. (2d) 290, and appears in the Record at Pages 134-143.

JURISDICTION OF THIS COURT

This case is before the Court on a writ of certiorari granted May 26, 1941. (R. 246) pursuant to Section 237 (b) of the Judicial Code (28 U. S. C. A., Sec. 344 (b)).

STATEMENT OF THE CASE

The question is whether the Supreme Court of Delaware gave full faith and credit to a judgment of the Court of Ordinary of Fulton County, Georgia. It arose in an interpleader suit instituted by Coca-Cola International Corporation, a Delaware corporation, in the Chancery Court for New Castle County, Delaware, against petitioners and The New York Trust Company, as Temporary Administrator by appointment of a surrogate's court in New York in *ex parte* proceedings. The interpleader suit involved the succession to a decedent's title to stock in the Delaware corporation, rival demands for a transfer of the stock having been made on the corporation by petitioners, as the Executors named in decedent's Will, and by said Administrator. There being no creditor in Delaware and no question as to local administration, the respective claimants were required to interplead between themselves as to their respective claims to the stock, consisting of 626 shares of the Class A and 626 shares of the common stock of Coca-Cola International Corporation owned by Julia M. Hungerford at the time of her death (R. 12-13).

Petitioners, in their pleading in the nature of a bill of complaint (R. 13-50, 91-112) asserted title to the stock by virtue of a judgment of the Court of Ordinary of Fulton County, Georgia, as finally affirmed by the Supreme Court of Georgia. The Georgia judgment was rendered in *inter partes* probate proceedings in which all persons interested in the succession (including decedent's husband), either as beneficiaries under the Will or as distributees in the event of intestacy, were *served personally*. The Georgia judgment established that decedent was domiciled in Fulton County, Georgia, at the time of her death, admitted the Will to probate and established Fulton County, Georgia, as the seat of general or domiciliary administration of

the estate. The judgment was affirmed by the Supreme Court of Georgia in an opinion holding that the probate was a general probate and that the finding of domicile was essential to the jurisdiction of the Fulton County Court of Ordinary. (*Hungerford v. Spalding*, 183 Ga. 547, 189 S. E. 2; R. 105-110).

In the probate proceedings, Hungerford (decedent's husband) filed a caveat alleging want of testamentary capacity and also that decedent was domiciled in the State of New York at the time of her death (R. 33-34, 38-39). After hearing, judgment was entered overruling the caveat, admitting the Will as duly probated in solemn form and adjudging that decedent died domiciled in Fulton County, Georgia (R. 34). The Executors thereupon qualified as general or domiciliary representatives of the estate (R. 32-33). Upon appeal by Hungerford to the Superior Court of Fulton County, Georgia (R. 40), his caveat was tried *de novo* (R. 17-18). A jury found that decedent had testamentary capacity and was domiciled in Fulton County, Georgia, at the time of her death and judgment was entered accordingly (R. 48-49). A motion by Hungerford for a new trial was overruled (R. 40) and he then appealed to the Supreme Court of Georgia, which court affirmed the judgment of the Superior Court (R. 105-110; *Hungerford v. Spalding*, 183 Ga. 547, 189 S. E. 2). The principal ground of error urged by Hungerford was that the trial court should not have made a finding as to decedent's domicile, but the Supreme Court of Georgia held, *inter alia*, that the finding was proper because the jurisdiction of the Fulton County Court of Ordinary depended upon decedent's domicile in that county at the time of her death.

While the Georgia litigation was in progress Hungerford instituted *ex parte* proceedings in a surrogate's court in New York, which resulted in the appointment of The New

York Trust Company as Temporary Administrator (R. 63-74). The Tax Commissioner of New York appeared in the proceeding in the surrogate's court to protect the alleged claims of that State to inheritance or succession taxes (R. 76-81). After the decision of the Supreme Court of Georgia the surrogate's court appointed the New York Trust Company as Administrator c.t.a., also in *ex parte* proceedings (R. 126-127, 131-133), and the Administrator c.t.a. was then made a party to the Delaware interpleader proceedings, adopting the contentions of the Temporary Administrator that decedent had died a resident of New York and therefore it was entitled to the Delaware stock.

At the trial in the Delaware court, petitioners introduced in evidence duly authenticated copies of the Georgia judgment and proceedings and objected to the introduction of any evidence as to decedent's domicile, on the ground that the Georgia judgment was entitled to full faith and credit and established the right and title of the Executors to the stock. The trial court admitted evidence of both sides on the subject of domicile, subject to the objection of petitioners, reserving for later decision the questions raised by petitioners as to the effect of the Georgia judgment. Subsequently the trial court filed an opinion finding that decedent died a resident of Fulton County, Georgia (R. 150-181); and that it therefore was unnecessary to pass upon the effect of the Georgia judgment, and the trial court made no decision on the question.

Upon appeal by the Administrator c.t.a. to the Supreme Court of Delaware that court reversed the trial court. Instead of first determining whether the Georgia judgment was conclusive upon the question of domicile, the Delaware Supreme Court reviewed the evidence and reversed the trial court on the question of fact as to decedent's residence and domicile at the time of her death, holding that

the evidence showed that decedent died domiciled in New York. *On the basis of that finding* the court held that the Administrator c.t.a. was entitled to the stock and that the Georgia judgment was not binding upon the Administrator c.t.a. because it was not a party to or in privity with a party to the Georgia proceedings. The decision was by three justices. One justice dissented and another justice who sat during the argument did not participate in the decision. A motion for reargument (R. 232-235) urging that the court's decision denied full faith and credit to the Georgia judgment was overruled without opinion (R. 235) and a final decree was entered on February 14, 1941 (R. 236-240).

Petitioners then filed in this court a petition for writ of certiorari to the Supreme Court of the State of Delaware. This case is now here upon the granting of their petition.

SPECIFICATION OF ERRORS

The Supreme Court of Delaware erred in holding that the Georgia judgment did not conclusively establish the title of the Executors to the stock in question for administration as the domiciliary or general representatives of the estate of Julia M. Hungerford, and that the Georgia judgment was not binding on the New York Administrator in a dispute as to the title to the stock for administration. The opinion and decree of the Supreme Court of Delaware failed to give the full faith and credit to which the Georgia judgment was entitled in the courts of Delaware under Article IV, Section 1, of the Constitution of the United States, and the Acts of Congress pursuant thereto (R.S. 905; 28 U.S.C.A. 687).

SUMMARY OF ARGUMENT

1. The Georgia judgment was rendered by a court which had jurisdiction over the subject matter and also jurisdiction over the parties by personal service.

2. Since all persons who could have any possible interest in the succession were parties to the Georgia judgment, that judgment was binding upon all the world in any contest relating to the succession to the title to any personalty of decedent.

3. The litigation in the Delaware courts involved the succession to the title to personalty of the decedent, consisting of shares of stock of a Delaware corporation. The Georgia judgment was therefore conclusive and entitled to full faith and credit in the Delaware courts.

4. Where a court's jurisdiction depends upon a particular fact and the court determines that factual question, the parties are bound and the judgment is entitled to full faith and credit in other states.

> The Supreme Court of Georgia had held that the jurisdiction of the Georgia court depended upon a determination of the factual issue of domicile and that the court had jurisdiction to determine that issue.

5. The Delaware courts did not give full faith and credit to the Georgia judgment by attempting to readjudicate the question of decedent's domicile (over the objection of the Executors) in a contest involving nothing more than the succession to the title to personalty of decedent.

6. The Georgia judgment was binding on the New York Administrator in a contest in Delaware for succession to the title to personalty of the decedent, although the New York Administrator was not a party to the judgment, because

(a) The New York Administrator was not entitled to be a party;

(b) A party to the Georgia proceeding could not have an administrator appointed in New York, in *ex parte* proceedings, during the progress of the Georgia proceeding, and thereby in effect nullify, in other states, the decision of the Georgia courts upon the factual issue of domicile;

(c) The New York Administrator acquired no interest in the succession above and unrelated to the interests of a distributee and neither the State of New York nor anyone else claiming as a creditor is affected by the finding of a domicile in the Georgia proceeding;

(d) Since a creditor is not entitled to be heard on the probate of a Will, he cannot, after the succession has been determined, dispute the title or right of possession of the personal representative whose title has been established in the probate proceeding;

(e) Since the Georgia judgment is binding upon all possible distributees, it is also binding on the New York Administrator as representative of a distributee, and, under the circumstances, the New York Administrator is the same person in law as decedent's husband, one of the distributees, who initiated the proceedings for the appointment of the New York Administrator, he having been a party to and participated in the Georgia litigation to its final conclusion.

7. The Georgia judgment determined that the Georgia administration was domiciliary and not ancillary. Such a judgment is conclusive where all persons having any possible interest as distributees of the estate are parties. A creditor is not a distributee.

8. The Delaware Supreme Court did not first determine whether the Georgia judgment was conclusive, as was its

duty, but examined the question of domicile and then proceeded to hold that the New York Administrator was entitled to the stock *because of its finding of a New York domicile for decedent.*

ARGUMENT

Under the full faith and credit clause of the federal constitution (Section 1, Article IV), as construed by this Court (*Roche v. McDonald*, 275 U. S. 449, 451), a judgment of a State court which had jurisdiction of the parties and the subject matter is entitled in the courts of every other State to the same credit, validity and effect which it has in the State where rendered and is equally conclusive upon the merits. Upon the introduction in evidence of the duly authenticated copies of the Georgia proceedings and judgment, the only inquiries open to the Delaware court were whether the Georgia court had jurisdiction of the parties and subject-matter and the effect of such a judgment in Georgia.

The Georgia Court Had Jurisdiction and Its Judgment Determined the Succession

The court which rendered the Georgia judgment had jurisdiction

(a) over the subject-matter, it being a court of general jurisdiction of matters relating to probate and to the estates of decedents.

Veatch v. Rice, 131 U. S. 293;

Maybin v. Knighton, 67 Ga. 103

Tant v. Wigfall, 65 Ga. 412

(b) over the parties, personal service having been obtained upon the parties thereto.

The Georgia judgment is binding upon all the world upon any question relating to the succession to the title to

any personalty of the decedent, because the parties to the judgment include all persons who could have any possible interest in the succession.

The litigation in the Delaware courts involved the question of the succession to the title to certain shares of stock. (The right of the State of New York to claim estate or inheritance taxes was not involved, and it is not contended that the Georgia judgment bars the State of New York from making any such claim, based upon an alleged domicile of the decedent in New York). The Georgia judgment was therefore conclusive upon the Delaware courts, the Executors having claimed the right to have full faith and credit accorded to the Georgia judgment as required by the federal constitution.

The Delaware Courts, in Examining Question of Domicile, Failed to Give Full Faith and Credit to Georgia Judgment

By examining the question of decedent's domicile and admitting evidence thereon (over the objection of the Executors), the Delaware courts failed to give full faith and credit to the Georgia judgment because the determination by the Georgia courts that decedent was domiciled in Georgia at the time of her death was conclusive whenever and wherever any question relating to the succession and based upon an alleged domicile elsewhere was raised.

Thormann v. Frame, 176 U. S. 350

Overby v. Gordon, 177 U. S. 214

Tilt v. Kelsey, 207 U. S. 43

Burbank v. Ernst, 232 U. S. 162

Baker v. Baker, Eccles & Co., 242 U. S. 394; 162 Ky. 683; 173 S. W. 109; L.R.A. 1917C, 171

Thomas v. Morrisett, 76 Ga. 384

In Re Fischer's Est., 118 N. J. Eq. 599; 180 Atl. 633

In Re Willett's Appeal, 50 Conn. 330

The Georgia courts had before them all possible distributees of the decedent's estate, and hence it was possible to have a single controlling decision upon the succession. This Court, in *Baker v. Baker, Eccles & Co.*, supra, considered the question posed by counsel in that case as to how it would be possible to determine judicially the domicile where an intestate left personalty in different states with different laws of distribution and with possible distributees residing in different jurisdictions, and said (Page 404):

> ". . . The answer is clear; Unless all possible distributees can be brought within the jurisdiction of a single court having authority to pass upon the subject-matter, either by service of process or by their voluntary appearance, it must in many cases be impossible to have a single controlling decision upon the question. . . ."

We believe it worth while to outline the facts involved in the leading cases.

In *Baker v. Baker, Eccles & Co.*, supra, the wife was appointed administratrix of her husband's estate by an *ex parte* judgment of a court of Tennessee. Decedent owned certain shares of stock in Baker, Eccles & Co., a Kentucky corporation, and a claim for several thousand dollars against that concern. The Tennessee court directed the wife, as administratrix, to deliver and convey this property to herself as sole heir-at-law, the debts having been paid. Under the Kentucky law the wife and mother of an intestate, dying without children, shared the estate equally. The mother applied for administration in Kentucky and was appointed

administratrix. The Kentucky administration was *ex parte* as to the widow.

The widow, individually and as administratrix of her husband, instituted a suit in Kentucky, resulting in the judgment under review. Baker, Eccles & Co. was the defendant. The mother intervened in that cause. The Kentucky court determined the issue of domicile as a factual matter, finding that the deceased was a resident of Kentucky, and awarded one-half of the stock to the widow and one-half to the mother. The fact of domicile was inquired into by the Kentucky court for the reason that the Tennessee judgment had no extra-territorial effect and was not entitled to full faith and credit as against the mother who had not been served and had not appeared in the Tennessee proceedings. The judgment of the Kentucky court, appointing the mother as administratrix, was not binding upon the widow for like reasons.

Had there been personal service in either of these cases against the other claimant the matter of domicile would have been adjudicated and not open to further inquiry.

In *Thomas v. Morrisett*, supra, the succession was determined by probate proceedings in Alabama in which all of the distributees were before the court. The domicile of the decedent was determined to be in Alabama. While that judgment was being appealed by certain of the heirs to the Supreme Court of Alabama, these heirs, residents of Georgia, instituted *ex parte* administration proceedings in the State of Georgia upon the ground that the decedent at the time of her death was a resident thereof. An administrator was appointed and took possession of certain personal property having a situs in the State of Georgia. The judgment of probate was affirmed by the Alabama Supreme Court and the executor applied to the *ex parte* administrator in

Georgia to turn over the assets of the estate in his hands which the Supreme Court of Georgia ordered be done, holding that the administrator appointed in Georgia was bound by the judgment of probate in Alabama, although not a party thereto.

The court's opinion in *In Re Fischer's Estate*, 118 N. J. Eq. 599, 180 Atl. 633, contains an excellent statement of the principles of law applicable in a situation where the domicile of the decedent is in dispute. Letters of administration were granted to the husband of the deceased in New Jersey on his representation that the decedent was a resident of New Jersey. This proceeding was *ex parte* and decedent's brother was not made a party. The brother instituted proceedings in New York to which all persons interested in the succession were made parties, claiming New York was decedent's domicile. The question of domicile was determined by the New York courts, and the New Jersey court on an application to revoke the letters of administration issued by it, granted the application, holding:

> "The determination of that issue as to domicile, by that court (the New York court) having jurisdiction of the subject-matter and of those parties, precludes any further legal dispute between them as to that issue."

If the decision of the Delaware Supreme Court in the instant case were sound, the New Jersey court would have determined for itself the domicile of the decedent.

The case of *In Re Willett's Appeal*, 50 Conn. 330 (1882) involved facts quite similar to those in the *Fischer* case, and the decision was to the same effect. There was an *ex parte* proceeding in Connecticut followed by an *inter partes* proceeding in New York in which the question of domicile

was determined to be New York. The Connecticut court held that, as the question of domicile had been determined in New York by a court of competent jurisdiction, that judgment concluded all the parties thereto.

The foregoing authorities establish that Hungerford and his representatives are bound by the proceedings in Georgia.

In the brief of counsel for the Administrator filed in opposition to the petition for certiorari, they challenged the statement that the New York Administrator was appointed in *ex parte* proceedings and seek to bind the other distributees, resident of Georgia, and the Executors by reason of notice having been served upon them in the State of their residence. This was the exact situation that existed in the case of *Baker v. Baker, Eccles & Co.*, supra. This Court disposed of that contention in the following language:

> "But it is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound" (Page 401),

and on Page 403:

> "And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend that authority and control of a State beyond its own territory."

Likewise this Court emphasized the distinction between a judgment *in rem* and a judgment *in personam* in so far as the succession was to be determined (Page 400):

> "How is the fact of decedent's domicile to be judicially ascertained as a step in determining what law is to govern the distribution? Obviously, if fundamental principles of justice are to be observed, the ascertainment must be according to due process of law; that is, either by a proceeding in rem in a court having control of the estate, or by a proceeding in personam after service of process upon the parties to be affected by the judgment."

This distinction is recognized in the cases already discussed, *In Re Fischer's Estate*, 118 N. J. Eq. 599, 180 Atl. 633, *In Re Willett's Appeal*, 50 Conn. 330, and *Thomas v. Morrisett*, 76 Ga. 384. The cases of *Thormann v. Frame*, 176 U. S. 350, and *Overby v. Gordon*, 177 U. S. 214, involve situations where the succession was being settled in a proceeding *inter partes*. An *ex parte* judgment of general administration was offered in evidence in each case and excluded. Certainly in view of that fact such a judgment could not challenge the title of the personal representatives as to personal property so settled in a proceeding *inter partes*.

In this connection let us point out that in *Overby v. Gordon*, as in *Thomas v. Morrisett*, the *ex parte* administrator, while the *inter partes* proceeding for administration was pending, took possession of assets of the estate and removed the same from the District. This Court, in pointing out that the question was not before it of whether or not those making payments to such *ex parte* administrator were protected, had this to say (Text 229):

> "Further, in the light of the decision of the Supreme Court of Georgia in the case of *Thomas v. Morrisett*, 76 Ga. 384, and an analogous decision by the Supreme Court of Errors of Connecticut, in *Willett's Appeal from Probate*, 50 Conn. 330, it would seem altogether probable that the DeKalb County Court, upon application made to it, will order its appointee to surrender to the administrator appointed in the District of Co-

lumbia the assets which were by the former removed from the District during the pendency therein of the proceedings for administration."

Full Faith and Credit Applies to Determination of Jurisdictional Facts

Where the jurisdiction of a court depends upon the existence of a particular fact, and the court determines that factual question, the parties to the proceeding are bound by that determination and the judgment is entitled to full faith and credit in other states.

Davis v. Davis, 305 U. S. 32

Sovereign Camp of Woodmen of the World v. Bolin et al, 305 U. S. 66

Stoll v. Gottlieb, 305 U. S. 165

Sunshine Coal Company v. Adkins, 310 U. S. 381, 403

Treinies v. Sunshine Mining Co., 308 U. S. 66, 78

Also other cases cited above.

The statement of this Court in *Stoll v. Gottlieb*, supra, is equally applicable to the present case:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

Jurisdictional Fact of Domicile Determined in Georgia Proceedings

The Supreme Court of Georgia held that the jurisdiction of the Georgia courts to render the judgment depended upon a determination of the factual issue of domicile and that the court had jurisdiction to determine that issue, saying:

> "The application alleged that the Testatrix resided in Fulton County, and, under this and other allegations made, must be construed as an application to probate the Will generally as a Will of a person domiciled in that county. *It was thus necessary in order to admit the Will to probate to show that the decedent was domiciled in Fulton County at the time of her death; otherwise the Court of Ordinary would not have had jurisdiction.*" (R. 108; italics ours).

The Georgia Judgment Binding on New York Administrator

The Georgia judgment was binding upon the New York Administrator in the contest in Delaware involving the succession to the title to assets of the estate, notwithstanding that the New York Administrator was not a party to the Georgia proceedings and judgment, because it was not entitled to be a party thereto and all persons interested in the question of the succession were parties. When decedent's husband, himself a party to the Georgia litigation, and during the progress of the Georgia litigation, had the Administrator appointed in New York in *ex parte* proceedings, he could not thereby in effect nullify, in other states, the decision of the Georgia courts upon the factual question of domicile that was in issue and upon which the jurisdiction of the Georgia courts depended. The New York Administrator acquired no interest in the succession over, above and unrelated to the interest of any possible

distributee; and neither the State of New York nor anyone else claiming as a creditor is affected by the finding of domicile in the Georgia proceedings. A creditor or tax claimant is not entitled to be heard on the probate of a Will and hence, after the succession has been determined, cannot dispute the title or right of possession of the personal representative whose title has been established in the probate proceeding.

Hooks v. Brown, 125 Ga. 122, 53 S. E. 583

Dunsmuir v. Scott, 217 Fed. 200

Tilt v. Kelsey, 207 U. S. 43

Schouler on Wills, Vol 2, P. 846, Sec. 746

It follows, therefore, that since the Georgia judgment is binding upon all possible distributees, including Hungerford, because he was a party to and participated in the Georgia litigation, it is also binding upon the New York Administrator as representative of Hungerford. Under the circumstances, the New York Administrator is the same person in law as Hungerford. In *Chicago, Rock Island & Pacific Rwy. Co. v. Schendel*, 270 U. S. 611, this Court refused to distinguish between the widow who was sole heir, and the administrator, holding the latter was bound by a judgment to which the former was a party, on the ground that they were in legal effect the same. Said this Court (P. 620):

> "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different. Bigelow on Estoppel, 6th ed. 145; and parties nominally different may be, in legal effect, the same."

See also

Sunshine Coal Company v. Adkins, 310 U. S. 381, 402.

Citing and following the *Schendel* case are:

Keith v. Willers Truck Service, Inc., 266 N. W. 256 (S.D.); 104 A. L. R. 1471

Lucy Haines Gibson v. Solomon, 136 Ohio St. 101; 23 N. E. (2d) 996; 125 A. L. R. 903

St. Louis-S. F. R. Co. v. Stuckwish, 137 Okla. 251; 279 Pac. 683

Directly in point are the cases of:

Thomas v. Morrisett, 76 Ga. 384

In Re Willett's Appeal, 50 Conn. 330

In Re Fischer's Estate, 118 N. J. Eq. 599, 180 Atl. 633

This Court recently denied certiorari in *Roberts v. Bathurst*, 112 Fed. (2d) 543 (5 C. C. A.) (certiorari denied 311 U. S. 709), a case almost identical in principle with the instant case and which held that the personal representative had no independent status from that of the sole beneficiary, and that a judgment binding on the sole beneficiary was binding upon the Administrator.

Counsel for the Administrator, in their brief in opposition to the petition for certiorari assert that a judgment against the heirs or distributees is not *res adjudicata* as to the personal representative, citing a number of cases including *Buchan v. Williamson*, 142 Ga. 198, 82 S. E. 548.

Their statement is incorrect if it is intended by the citation of the case of *Buchan v. Williamson* to create the idea that the Supreme Court of Georgia has ever so held. On the contrary, that court, in the case of *Thomas v. Morrisett*, 76 Ga. 384, (see Pp. 11 and 12) held exactly the opposite.

Even prior to the *Morrisett* case, the Georgia Supreme Court, in *Hardaway v. Drummond*, 27 Ga. 221, had laid down the rule:

> "A recovery by or against the heirs at law may be pleaded in bar to a suit brought by the administrator of the estate for their benefit, there being no debts due or owing by the intestate."

The case of *Buchan v. Williamson* involved a state of facts totally different. A suit was instituted by the heirs to recover a parcel of land. There was no personal representative qualified to sue. An administrator was later appointed. Under the laws of Georgia, real estate is liable for the debts of the decedent (Section 113-901, Georgia Code Ann.). The administrator, thus representing both heirs and creditors, brought suit to recover the land. The Georgia Supreme Court held that the previous suit did not bind the creditors of the estate and, therefore, the administrator was not bound. All of the cases cited by counsel for the administrator are of the latter type; that is, they involve claims against the estate or proceedings to recover assets of the estate involving in both instances the rights of creditors in addition to the rights of heirs.

The discussion in 34 *C. J.* 1038-1039, also cited, clearly draws the distinction between a judgment settling the succession and one involving a controversy in which creditors are interested.

Counsel for the Administrator fail to recognize the important distinction between the rule applicable where the succession only is involved, or where a right is being asserted solely on behalf of the distributee which has been previously determined against such distributee, and the rule applicable where the interests of creditors are involved as in claims against the estate or proceedings to recover assets of the estate.

Chicago, Rock Island & Pacific Rwy. Co. v. Schendel, 270 U. S. 611, supra

At no time during the litigation have counsel for the Administrator cited any case which holds that a personal representative can challenge the succession where it has been settled in an *inter partes* proceeding, such as that leading to the Georgia judgment.

The opinion of the Supreme Court of Delaware states that the New York Administrator was not bound by the Georgia judgment because the New York Administrator is far more than the representative of a mere creditor or tax claimant and that New York's right to be heard on the question of domicile is not the result of its claim for taxes, but (R. 231):

> "... the fact that the decedent was its domiciled citizen at the time of her death; and the appellant (the New York Administrator) appointed by authority of its proper court, is its arm to gather together, in so far as is permitted by law, the personal property of the deceased, and to administer and distribute the property according to her Will and the laws of the State. Being the seat of domiciliary administration, it is not compelled to press its claim for taxes in a jurisdiction of ancillary administration."

No cases are cited in support of this statement and we have found none which do support it, but, as we have already pointed out, the authorities are to the contrary. That the State of New York recognizes no such rule will be seen from an examination of

State of Colorado v. Harbeck, 232 N. Y. 71; 133 N. E. 357, 359

Martin's Estate, 240 N. Y. Supp. 393, affirmed in 174 N. E. 753

In the *Martin* case, the decedent's domicile was admittedly in Connecticut, and a Connecticut administrator was

appointed so that the State of Connecticut might collect taxes due on the estate of its "domiciled citizen". The New York courts, however, refused to deliver the assets of the estate, which had been removed from Connecticut to New York, to the Connecticut administrator.

The Delaware Supreme Court lost sight of the fact that its first duty was to determine whether it had the right to enter upon an inquiry as to domicile if it was to give full faith and credit to the Georgia judgment. It nevertheless made that inquiry without determining the Federal question and, after making a finding of domicile in New York, proceeded to hold that the New York Administrator was entitled to the stock *because of its finding of a New York domicile for decedent*. In so doing, it failed to give to the Georgia proceedings the full faith and credit to which they are entitled.

Counsel for the Administrator see no significance in the fact that the Supreme Court of Delaware first determined the question of domicile, and then proceeded to examine the effect of the Georgia judgment. Its significance is twofold: First, in the fact that the effect to be given the Georgia judgment in no way depends upon a determination of the factual issue of domicile by the Delaware court. Second, in finding that the decedent was domiciled in New York at the time of her death the court consequently concluded that the administration in New York was general or domiciliary, thus ignoring the fact that the question of the state of domiciliary administration had already been conclusively determined as Georgia. It was thus assumed that the New York *ex parte* judgment had the same legal effect in determining the succession as the *inter partes* judgment of the Georgia court. This would have been correct had both judgments been *ex parte* as to the respective distributees thereunder.

Baker v. Baker, Eccles & Co., supra

But in view of the fact that the Georgia judgment was binding on all parties interested in the succession, this was a denial to that judgment of the "full faith and credit" to which it was entitled under the Constitution and laws of the United States.

The Georgia Judgment Determined That the Georgia Administration is Domiciliary and not Ancillary

The Georgia judgment determined that the Georgia administration was domiciliary and general and not ancillary or local. Such a judgment is conclusive where all persons interested in the distribution of the estate are parties to the judgment.

Thormann v. Frame, 176 U. S. 350
Overby v. Gordon, 177 U. S. 214
Tilt v. Kelsey, 207 U. S. 43
Burbank v. Ernst, 232 U. S. 162
Baker v. Baker, Eccles & Co., 242 U. S. 394, L. R. A. 1917C, 171
Thomas v. Morrisett, 76 Ga. 384
In Re Fischer's Estate, 118 N. J. Eq. 599; 180 Atl. 633
In Re Willett's Appeal, 50 Conn. 330

Once determined in such a proceeding the judgment determining the succession cannot be attacked in any other state. The effect of the Delaware decision is that a dissatisfied litigant in such a proceeding may go into another state, have an administrator appointed in *ex parte* proceedings, and, in defiance of and ignoring the previous adjudication, have the question of domicile litigated all over again in a contest between the two sets of representatives in a third state where property of the decedent is located.

CONCLUSION

The decision of the Delaware Supreme Court is of particular importance in view of the large number of Delaware corporations with stockholders throughout the nation. Heretofore it has been generally recognized that the appointment of an executor by a court of competent jurisdiction wherein the domicile of the decedent was determined, and in which all persons interested in the succession were before the court, vested in the personal representative the title to shares of stock owned by the decedent and enabled such personal representative to transfer a good title thereto in the course of administration. The Delaware decision strips the Georgia judgment of the protection which it has heretofore been considered that such judgments have under the full faith and credit clause of the federal constitution and, if allowed to stand, will produce hardships in the administration of decedent's estate.

It is respectfully submitted, therefore, that the judgment of the Supreme Court of Delaware should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 81

JULIAN RILEY and HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,
Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, ET AL.
Respondents.

REPLY BRIEF FOR PETITIONERS

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INDEX

	Page
The Issue Before the Delaware Court	1
This Case Can Not Be Determined by Assuming that New York Was in Fact Decedent's Domicile	3
Respondent May Not Dispute Effect of Georgia Judgment	4
However Classified, Georgia Judgment Determined Petitioners' Title	10
The Issue of Domicile was Essential to, and Determined in, Georgia Proceedings	10
Existence of New York Creditors Immaterial	11
As to the "Sovereign Right" of the State of New York to Control the Administration	11
There is no Merit in the Contention that the Court is Prevented from Giving Effect to Georgia Judgment by Failure to Prove its Effect under Georgia Law	13
As to Georgia Judgment Determining Domicile Not being Conclusive as to Domicile under Delaware Law	17
Conclusion	18

CASES CITED

	Page
Baker v. Baker, Eccles & Company, 242 U. S. 394	7, 9
Buchan v. Williamson, 142 Ga. 198, 82 S. E. 548	7
Chicago, Rock Island & Pacific Railway v. Schendel, 270 U. S. 611	8
Drake v. Drake, 187 Ga. 423, 1 S. E. (2d) 573	8
Dyal v. Dyal, 187 Ga. 600, 1 S. E. (2d) 660	8
Gibson, Lucy Haines, v. R. W. Solomon, 136 Ohio St. 101, 23 N. E. 996, 126 A. L. R. 803	9
Gratton's Estate, In Re, 78 N. J. Eq. 225, 78 A. 813	6
Lutz v. Roberts Cotton Oil Co., 26 Del. 227, 82 Atl. 601	16
Mahoning Valley Rwy. Co. v. Van Alstine, Admr., 77 Ohio St. 394, 83 N. E. 601, 14 L. N. S. 893	9
May Coal Co. v. Robinet, Admr., 120 Ohio St. 110, 165 N. E. 576, 64 A. L. R. 441	9
Overby v. Gordon, 177 U. S. 214	4, 9
Parks, In Re Estate of, 166 Iowa 403, 147 N. E. 850	8
Tant v. Wigfall, 65 Ga. 412	15
Thomas v. Morrisett, 76 Ga. 384	7, 8
Thormann v. Frame, 176 U. S. 350	4, 9
Veach v. Rice, 131 U. S. 293	15
Wash v. Dickson, 147 Ga. 540	15
Wilkins v. Ellett, Admr., 9 Wall. 740	2, 12

STATUTES CITED

	Page
Sec. 113-602, Georgia Code of 1933	14, 15
Sec. 113-603, Georgia Code of 1933	14
Sec. 113-902, Georgia Code of 1933	14
Sec. 3868, Delaware Code	16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 81

JULIAN RILEY and HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,
Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, ET AL,
Respondents.

REPLY BRIEF FOR PETITIONERS

Respondent's brief tends to obscure the relatively simple question in this case. Therefore, as a foundation for our reply, we deem it advisable to re-state the issue.

The Issue Before the Delaware Court

Julia M. Hungerford, the decedent, at the time of her death, was the owner of stock of Coca-Cola International Corporation. That corporation filed in Delaware a bill of interpleader for the purpose of determining *who succeeded to the title to said stock at decedent's death.* This was the only issue to be determined.

The law is clearly established that title to the personalty of a decedent in such a case becomes vested in the domi-

ciliary representatives of decedent's estate for the purpose of succession and distribution according to the law of the domicile. It is difficult to find any better statement of the applicable law than that contained in *Wilkins v. Ellett, Administrator*, 9 Wall. 740, in which this Court said:

> "It has long been settled, and is a principle of universal jurisprudence, in all civilized nations, that the personal estate of the deceased is to be regarded, for the purpose of succession and distribution, wherever situated, as having no other locality than that of his domicile; and, if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated. The original administrator, therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue, according to the law of the place, or directions of the will, as the case may be."

The Executors claimed title to the stock as the domiciliary representatives of decedent's estate. Their title resulted from a general or domiciliary probate by a court of competent jurisdiction having as parties thereto all persons interested in the succession either as beneficiaries under the Will or as heirs at law, in which proceeding the domicile of the decedent was determined and this adjudication affirmed by the Supreme Court of Georgia. The Executor's title can not be challenged for the reason that it was conclusive upon all persons having an interest in the succession and is, therefore, conclusive against all the world in any contest involving the succession to assets of the estate.

The New York Administrator had no right to challenge the title of the Executors in the Delaware proceedings, since

the sole issue was that of succession. The New York Administrator was not entitled to be heard because it was not a party interested in the succession and represented no party interested in the succession who was not already bound. As neither a creditor nor tax claimant is entitled to be heard on the succession, the New York Administrator was not entitled to be heard on their behalf on the sole question presented to the Delaware court. The right of the State of New York to collect estate or inheritance taxes was not involved in the Delaware interpleader suit.

This Case Can Not Be Determined by Assuming That New York Was in Fact Decedent's Domicile

The Delaware Supreme Court based its decision on its finding that New York was the domicile of the decedent and, therefore, respondent was the domiciliary representative. Counsel for respondent fall into the same error and base each argument on the same assumption, instead of showing why the Delaware court had power to ignore the Georgia judgment and to enter upon the inquiry of domicile for itself.

The question here presented is not what effect is to be given to the Georgia judgment upon an assumption that New York and not Georgia was the domicile of decedent at the time of her death, but whether the Delaware court, in view of the Georgia judgment, had the right to decide the question of domicile for itself, and, based upon its finding of domicile to hold that the Georgia judgment did not establish the title of the Executors.

In effect, what the Supreme Court of Delaware has held, and what counsel for the respondent assert, is that there can be no conclusive determination of the succession and

distribution, even when all persons entitled to be heard on such questions are before the court.

Respondent May Not Dispute Effect of Georgia Judgment

We have again stated the nature of the question presented, for the reason that we feel the error committed by the Delaware Supreme Court was due to confusion as to the problem and the rules applicable to its solution.

When the rules applicable are considered, it is unnecessary to approach the problem from the standpoint of trying to decide the question on the basis of whether the New York Administrator was a party to or in privity with a party to the Georgia judgment. It is clear that it was not a party to the Georgia judgment. It is equally clear that *on a question involving the succession*, it had no right to challenge the Georgia judgment determining that question, unless it represented or was in privity with one who was entitled to be heard on that question. But as all persons who were entitled to be heard, were before the Georgia court, and are concluded, respondent represented no one who was not already bound. If its appearance in the Delaware proceedings was not as a representative of a person entitled to be heard, then it was a stranger to the question presented and clearly had no rights in the proceedings. It must be remembered that the proceeding in Delaware was not one to assess estate taxes for the benefit of the State of New York. It was simply an interpleader suit to determine which of two claimants had succeeded to the title.

Respondent seems to rely upon the cases of *Thormann v. Frame*, 176 U. S. 350, and *Overby v. Gordon*, 177 U. S. 214, as sustaining its right to challenge the title of the Executors to the Delaware stock. These cases not only fail to support

this contention but hold to the contrary. There was involved in each case a judgment identical in legal effect with the judgment of the surrogate's court appointing the New York Trust Company as Administrator c. t. a., in that while both undertook to establish that the administration was domiciliary, both were *ex parte* as to other distributees. These judgments were relied on in *inter partes* probate proceedings in other states as establishing the title of the administrators named therein. When offered in evidence, they were excluded or construed as without effect except in the state where rendered, and the *inter-partes* proceedings went forward to judgment, establishing the title of the domiciliary representative. It is a remarkable contention to make, that such *ex parte* judgments, while not given any weight in *inter partes* probate proceedings wherein the title of the personal representative to all the personal property was established, could thereafter be utilized to hold the title of the Executors thereby established as without effect.

The cases cited on Page 12 of the brief for respondent, in support of the assertion that the administrator or executor is not in privity with the heirs or distributees so that a judgment against the latter does not bind the former, likewise lend no support to respondent's contentions. None of the cases cited involves the effect of a judgment establishing the title of executors as the domiciliary representatives of an estate. These authorities are concerned only with details of administration *after the nature of the administration has been settled*, such as the collection of assets, disputes over the title to real estate, and the settlement of decedent's debts. The distinction between the two classes of cases was made on Pages 18-20 of our main brief. In the cases cited by respondent, it is obvious that the administrator or executor as a trustee for creditors as well as distributees is interested in questions involving assets and liabilities of the

estate, but where the question is the determination of the nature of the administration, it is equally clear that the creditors are not interested for the reason that the rights of the creditors are not affected by how the question is determined. They are entitled to be paid in any event and the assets available for payment or the amount of the debts which must be paid are not affected by the decision of the question whether an administration is domiciliary or ancillary. As we have pointed out, only the heirs at law or distributees under the will are concerned with this question, and when they are bound by its determination, no one else is entitled to challenge that determination as no one else has any real interest in it.

In addition to the cases cited in our main brief, we wish to call the Court's attention to

In Re Gratton's Estate, 78 N. J. Eq. 225, 78 A. 813

in which the court, in considering the effect of a Pennsylvania judgment of distribution, made this statement making the distinction which we think clearly exists:

> "While ordinarily it is held that judgments against an administrator in one jurisdiction are not binding upon an administrator appointed in another jurisdiction for want of privity between them (Story, Confl. Laws, Sec. 522; Freeman on Judgments, Sec. 163; 23 Cyc. 1591), yet I think this rule properly applies only to judgments that manifest an indebtedness of the intestate or of the administrator, and does not extend to a decree settling the distribution of the surplus of the estate in the state of the domicile; such decree being, in effect, an adjudication against certain claimants of distributive shares, and not involving the claims of creditors; for, as already remarked, distribution is to be settled by the law of the domicile."

There could be no other rule in view of the full faith and

credit clause. As stated by this Court in *Baker v. Baker, Eccles & Company*, 242 U. S. 394, 401

> "No State need allow property of a decedent to be taken without its borders until debts due to its own citizens have been satisfied; and there is nothing in the Constitution of the United States aside from the full faith and credit clause to prevent a State from giving a like protection to its own citizens or residents who are interested in the surplus after payments of debts."

No one doubts that an administrator or executor is properly a party to an action to recover assets of an estate. The representative's duty is to collect such assets, pay the debts, and then to distribute the residue to those entitled. But a question of this character was not involved in the Delaware interpleader suit. No one denied that the stock should be administered as a part of decedent's estate. The only question was which of the claimants was entitled to the stock for the purposes of administration, and this is a question which had already been determined in a proceeding to which all persons entitled to be heard were parties.

The suggestion is made by counsel for respondent (See Pages 14-16 of respondent's brief) first that the case of *Buchan v. Williamson*, 142 Ga. 198, 82 S. E. 548, is not in conflict with the case of *Thomas v. Morrisett*, 76 Ga. 384, and further that, if there be a conflict, the latter case has been overruled by the former. As the decision in the *Buchan* case has already been sufficiently discussed (our main brief Pp. 18-19), we will confine ourselves at this time to the alleged overruling of *Thomas v. Morrisett*.

It is only necessary to point out that the principle relied on in *Thomas v. Morrisett* has been applied in two recent cases by the Supreme Court of Georgia, to wit:

Drake v. Drake, 187 Ga. 423, 1 S. E. (2d) 573

Dyal v. Dyal, 187 Ga. 600, 1 S. E. (2d) 660

In the *Drake* case the wife had obtained a divorce in Florida in which proceedings the husband denied that the wife was a resident of Florida. This issue was decided adversely to the husband and a divorce granted. The husband sought to raise the same issue in subsequent proceedings in Georgia, but the Georgia Supreme Court held that the husband was bound by the Florida judgment, saying:

> "The decree was valid in Florida; it is valid here. A judgment good at home is good everywhere. *Tompkins v. Cooper*, 97 Ga. 631, 25 S. E. 247; *Thomas v. Morrisett*, 76 Ga. 384. . . ."

The *Dyal* case was similar on its facts, both cases dealing with the effect of a judgment based upon personal service where a jurisdictional fact was involved. The court, in the *Dyal* case, did not cite *Thomas v. Morrisett* as in the *Drake* case, but cited the *Drake* case only.

The case of *Chicago, Rock Island & Pacific Railway v. Schendel*, 270 U. S. 611, cannot be distinguished upon the ground that the administrator was merely a trustee for a cause of action. It was not the nature of the property claimed by the administrator that accounted for the identity of the parties, but it was the fact that the widow was the sole beneficiary of any recovery that the administrator might make. The implication that the rule would have been different in the administration of an ordinary decedent's estate is refuted by *In Re Estate of Parks*, 166 Iowa 403, 147 N. E. 850, and the other cases of trusteeship cited by the court. The same test applies in the case of statutory administration to prosecute a recovery for the unlawful homicide of the decedent. If the representation of the administrator is solely

for the next of kin or the widow, a judgment against either in their individual capacity is a judgment binding on the administrator.

See the case of *Lucy Haines Gibson v. R. W. Solomon*, 136 Ohio St. 101, 23 N. E. 996, 126 A.L.R. 803, which follows the *Scheidel* case and draws the distinction between the two types of representation, distinguishing the case of *Mahoning Valley Rwy. Co. v. Van Alstine, Admr.*, 77 Ohio St. 394, 83 N. E. 601, 14 L.N.S. 893, and *May Coal Co. v. Robinet, Admr.*, 120 Ohio St. 110, 165 N.E. 576, 64 A.L.R. 441.

The effect of the Georgia judgment is conclusively to determine the title of the Executors to personal property wherever situated, while the effect of the New York judgment is to vest in the New York Trust Company as administrator c.t.a. the right of a local administration, that is, to administer property having a situs in the State of New York for the benefit of creditors and tax claimants therein, the residue to be turned over to the Executors for distribution according to the law of the domicile as determined between the parties at interest, that is, all possible distributees. The New York judgment has no force and effect outside of the State of New York. This is definitely settled by *Overby v. Gordon*, *Thormann v. Frame*, and *Baker v. Baker, Eccles & Company*, supra. Respondent seeks to put its judgment upon a parity with the Georgia judgment by, first, assuming that the domicile of the decedent was in fact in New York and, second, by contending that not having been heard on the probate proceedings in Georgia, it was entitled to question the finding of domicile in the Georgia proceedings.

The Executor's title to the stock may not be ignored in this way without denying to them the protection of the full faith and credit clause.

However Classified, Georgia Judgment Determined Petitioners' Title

Counsel for respondent in their brief enter into several involved discussions of the distinction which exists between a judgment in rem and a judgment in personam. No one disputes that a judgment in rem binds only property within the control of the court rendering the judgment; but it is equally clear that the state of the domicile has exclusive jurisdiction over personal property located elsewhere for the purposes of the succession and distribution. In any event, the Georgia judgment determined the title of the Executors as the domiciliary representatives in proceedings to which all persons interested were parties. As such it operates as a judgment in personam. However it may be classified, the result is the same, that it determined that the Georgia administration was domiciliary in nature, and such determination concluded the question as all persons entitled to raise it were served personally in the proceedings.

The Issue of Domicile Was Essential to, and Determined in, Georgia Proceedings

On Page 2 of respondent's brief, the statement is made that there was actually no contested trial in Georgia with respect to the true domicile of the decedent. The issue of domicile was tendered by the application of the Executors to probate the will in solemn form, and the determination of domicile was necessary before the will could be admitted to probate. The Supreme Court of Georgia so held when Hungerford asserted the contrary in the same proceedings on appeal (R. 105-110). Hungerford filed a caveat in which he asserted that the decedent died a resident of New York. The Executors were thus put on notice that Hungerford claimed that the administration in Georgia could not be domiciliary. Evidence was introduced on the question of

domicile, and it was found that the decedent at the time of her death was a resident of Georgia. Hungerford could not, as the Supreme Court of Georgia held, simply refrain from offering evidence on the question, and then later assert that he was not bound.

Existence of New York Creditors Immaterial

Counsel for respondent, on Pages 23 and 25, discuss the existence of creditors in New York. What is thus stated is based solely upon an allegation in respondent's answer in the trial court; but no evidence was offered in support of the allegation. The allegation, therefore, was not proved, and, if any implication is to be drawn, the implication would be that there were no New York creditors. The record shows that counsel for petitioners, (R. 183-184), in response to a question from the Chancellor, stated: "So far as I know there are no creditors of the decedent in the State of New York." Actually, it is altogether immaterial whether there were any New York creditors.

As to the "Sovereign Right" of the State of New York to Control the Administration

Counsel for respondent assert on Page 27 of their brief the "proposition of constitutional law" that the State of New York has the "sovereign right" to control the administration of the estate of one who died domiciled in New York. Precisely the same argument might be made with respect to the "sovereign right" of the State of Georgia. The "sovereign right" of the State of New York is not involved or challenged. The argument assumes, gratuitously, a New York domicile for decedent, although the right of the Delaware court to enter upon an inquiry as to decedent's domicile and to make an independent finding is the question in issue. In this case the question of domiciliary administration was determined in the probate proceedings where all

parties entitled to be heard on that question were before the court. When so determined, the judgment establishes the title of the domiciliary representatives to personalty having a situs in another state.

The fact that the property of an estate may be subject to the payment of tax claims does not result in divesting the title of the Executors any more so than the granting of ancillary administration where there is personalty situated in another state (See *Wilkins v. Ellett, Administrator*, 9 Wall. 740 at 742). The only result would be that if the tax claims were valid, the Executors would be required to pay such claims (along with any other valid claims against the estate) before distributing the residue to the beneficiaries. No "sovereign rights" are involved.

The Georgia judgment does not deprive the State of New York of the right to assert its claim for estate or inheritance taxes based on the claim that decedent died a resident of New York. What was determined in the Georgia proceedings was not any right of the State of New York but the forum for domiciliary administration and the title of the Georgia executors to the personalty for the purposes of administration and distribution. The State of New York is not concerned with the determination of the succession, and it is not bound by any findings in connection with that determination, in so far as its claims for taxes are concerned.

Counsel argue that, as a practical matter, giving effect to the finding of domicile in the Georgia proceedings will result in New York being deprived of any opportunity to collect its taxes. The argument presented is unique. It is based on the fact that the State of Georgia by statute extends the use of its courts to other states seeking to enforce liabilities for taxation, when such states extend like comity to the State of Georgia, and that as New York does not see

fit to extend like comity, then it would be barred the use of Georgia courts.

How this argument is relevant is not shown in respondent's brief. Aside from its irrelevancy, it is only necessary to point out that if New York may not use the courts of Georgia to enforce a tax obligation, this results not from the Georgia judgment, nor indeed from any act on the part of the State of Georgia, but solely from the act of the State of New York itself in refusing to extend the use of its courts to other states seeking to enforce tax obligations. In no event could this divest the title of the Executors to the personal property of the decedent.

There is No Merit in the Contention that the Court is Prevented from Giving Effect to Georgia Judgment By Failure to Prove its Effect Under Georgia Law

Respondent asserts that petitioners failed to prove the Georgia "law or usage" given to judgments of the character relied upon, and consequently it cannot be claimed that full faith and credit has been denied (Respondent's brief, Pp. 35-39).

This is the first time this point has been raised in the case. It was not made before the chancery court in Delaware or before the Delaware Supreme Court, and it is obvious from an examination of the opinion of the latter court, that its decision was in no way based upon any failure on the part of the petitioners to prove the effect of the Georgia judgment in Georgia.

The Georgia law was established in this case. Not only were the entire proceedings in the Georgia courts set forth by the Executors in exhibits to their statement of claim and the amendment filed thereto, but duly authenticated copies

of the entire Georgia proceedings beginning with the Ordinary's Court, and terminating with the decision and judgment of the Georgia Supreme Court were offered and received in evidence (R. 194, 195, 196, 197). Furthermore, the following sections of the Georgia Code of 1933 were set forth in the statement of claim and admitted in the answer:

Section 113-603 (R. 15, 52)

"The court of ordinary shall have exclusive jurisdiction over the probate of wills. The residence of testator at his death shall give jurisdiction to the ordinary of that county."

Section 113-602 (R. 16, 53)

"Probate by the witnesses, or probate in solemn form, is the proving of the Will, after due notice to all the heirs at law, by all the witnesses in life and within the jurisdiction of the court, or by proof of their signatures and that of the testator, if the witnesses are dead or inaccessible; and the ordering to record of the will so proved. *Such probate is conclusive upon all the parties notified, and all the legatees under the will who are represented in the executors.*" (Italics ours).

And Section 113-902 to the effect that under the intestacy laws of Georgia the husband is the sole heir at law of the wife when there are no children (R. 16, 53).

The Executors, in Paragraph 5, alleged that Robert Hungerford, the husband of decedent, Julia G. Murphy, her mother, and Katherine Riley, her sister, constituted all of the heirs at law of decedent and all of the beneficiaries named in decedent's Will; and in Paragraph 6 the Executors alleged that such persons were the only parties entitled to be heard on the question of the probate of decedent's Will (R. 15). Respondent admitted the allegations of these paragraphs (R. 53).

Respondent's answer asserted first that the proceedings in Georgia did not establish the title of the Executors as the domiciliary representatives as the petition for probate incorrectly averred the residence of the testatrix (R. 52). After the filing of the answer, this question was decided adversely to respondent's contention by the Supreme Court of Georgia (R. 105). The other contention was that decedent died a resident of New York and consequently the New York Administrator and not the Georgia Executors was the domiciliary representative.

That such a judgment has a conclusive effect in Georgia is obvious from Georgia Code Section 113-602. That the Georgia courts have construed said Code Section to mean what it says concerning the conclusive nature of a solemn form of probate is seen by reference to two cases cited in the opinion of the Georgia Supreme Court (R. 109), to wit, *Tant v. Wigfall*, 65 Ga. 412; *Wash v. Dickson*, 147 Ga. 540. It is only necessary to quote the first headnote in the latter decision as the ruling is the same in both cases:

> "A judgment of a Court of Ordinary, granting letters of administration upon an estate, by a judgment of a court of general jurisdiction, cannot be collaterally attacked unless the record negatives the existence of necessary jurisdictional facts."

This construction of Georgia law has been followed by this Court in *Veach v. Rice*, 131 U. S. 293. This Court, on Page 314 of that decision, says:

> "The Courts of Ordinary in Georgia are Courts of original, exclusive and general jurisdiction over decedents' estates, and the subject matter of these orders, and its judgments, are no more open to collateral attack than the judgments, decrees or orders of any other court."

The statutes pleaded by petitioners and admitted by respondent, the proceedings in Georgia, including the judgment rendered and the opinion of the Supreme Court of Georgia, make clear the law or usage in Georgia as to the effect to be given to the judgment.

The Court's attention is called to the Delaware statute, Code Section 3868, expressly recognizing the authority of foreign executors in Delaware, providing in part as follows:

> "Letters testamentary, or of administration, granted in any other State, and produced under the seal of the office, or Court, granting the same, shall be received in this State as competent authority to the executor, or administrator, therein named; . . ."

Counsel for respondent assert that the effect which petitioners seek to have given to the Georgia judgment is one that is not apparent on its face, for the reason that it does not purport to bind the New York Administrator c. t. a. It is universally the law that executors named in a will succeed to the title to the decedent's personalty. This result follows from the Georgia judgment as much as it follows from a money judgment that the plaintiff is entitled to a recovery of money since both are judgments *inter partes*.

That this rule is followed by the Supreme Court of Delaware is manifest by the case of

Lutz v. Roberts Cotton Oil Co., 26 Del. 227, 82 Atl. 601

from which we quote:

> "The rule is unquestioned that when a court has jurisdiction of the subject matter of a suit and of the parties to it, its judgment upon the merits of the controversy is conclusive between the parties upon every

question of fact directly in issue and determined in the action, and that to such a judgment, whether declared upon as a cause of action or pleaded as a defense, the courts of all the states are bound to give full faith and credit."

The Georgia judgment and the proceedings in which it was rendered show clearly that the nature of the administration was determined to be domiciliary and not ancillary and that petitioners qualified as the domiciliary representatives of the estate. As such, they became vested with title to the personalty of the decedent wherever situated, subject only to the right of a foreign state to administer property within its own borders for the protection of its own citizens. This general rule is recognized by the Supreme Court of Delaware (R. 225) and the cases of this Court there cited.

As to Georgia Judgment Determining Domicile Not Being Conclusive as to Domicile Under Delaware Law

Counsel for respondent assert on Pages 46-50 of their brief that as the law of domicile in Georgia may conceivably be different from the law of domicile in Delaware, it follows that a finding of domicile in Georgia is not binding on the Delaware courts. There is nothing in the record to show any substantial difference in the law of domicile as applied by the two states, but even if this should be true, we fail to see in what manner it affects the question now before the Court. The rules with reference to the admission of evidence might be different in the two states, but the result would not be affected. The Delaware Supreme Court has correctly set forth the results which flow from the establishment of a domiciliary administration (R. 225). What is important is the result, i. e. the establishment of the domiciliary administration and the results which flow therefrom, and not the various rules of evidence and law producing that result. There is nothing in the decisions of this Court

construing the full faith and credit clause which indicates a requirement that the rules applied in arriving at a judgment in one state must be identical with those which would be applied in any state where the judgment is relied on.

CONCLUSION

Counsel for respondent have advanced no arguments which support the action of the Supreme Court of Delaware in first inquiring into the factual issue of domicile instead of first determining whether it had the right to make such an inquiry. As the title of the Executors had been determined by the Georgia judgment to be that of domiciliary representatives, and such determination was conclusive in that it bound all persons entitled to be heard on the question, it follows that the Supreme Court of Delaware had no right to inquire into the question of domicile, and its decision that respondent was entitled to the stock denied to the Georgia judgment the full faith and credit to which it was entitled.

It is respectfully submitted, therefore, that the judgment of the Supreme Court of Delaware should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~1043~~ 81

JULIAN RILEY AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,
Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C.T.A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, AND COCA-COLA INTERNATIONAL CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX.

Page

Table of Cases Cited.

Baker v. *Baker-Eccles Co.*, 242 U. S. 394 8
Boswell's Lessee v. *Otis*, 9 How. 336 2
Brooklyn, etc., R. R. v. *National Bank*, 102 U. S. 14 2
Buchan v. *Williamson*, 142 Ga. 198, 82 S. E. 548 3
Burbank v. *Ernst*, 232 U. S. 162 8
Chamberlain v. *Fay*, 205 Ia. 662, 216 N. W. 700 3
Chandler v. *Manifold*, 290 U. S. 665 5
City of Boston v. *Jackson*, 260 U. S. 309 1
Cole, Admr., v. *Lafontaine*, 84 Ind. 446 3
Cooper v. *Reynolds' Lessee*, 10 Wall. 308 2
Dewey v. *Des Moines*, 173 U. S. 193 2
Dorr v. *Stockdale*, 19 Ia. 269 3
Dorrance v. *Pennsylvania*, 287 U. S. 660 5
Dorrance' Estate, Re, 170 A. 601 8
Equitable Life Assurance Society v. *Brown*, 187 U. S. 308 1
Fleming v. *Fleming*, 264 U. S. 29 1
Forbes v. *Douglass*, 175 Mass. 191, 55 N. E. 847 3
Green v. *Brown*, 146 Ind. 1, 44 N. E. 805 3
Hansberry v. *Lee*, — U. S. —, 61 Sup. Ct. 115 (No. 29, October Term, 1940, decided November 12, 1940) 2
Harris v. *Hardeman*, 14 How. 354 3
Howard, Ex parte, 9 Wall. 175 3
Howard v. *Williams*, 228 Ky. 259, 14 S. W. (2d) 1096 3
Humes v. *Scruggs*, 94 U. S. 22 3
Hungerford v. *Spalding*, 183 Ga. 547 9
Johnson v. *Powers*, 137 U. S. 156 2
Johnson's Admr., v. *Longmire*, 39 Ala. 143 3
King v. *West Virginia*, 216 U. S. 92 1
McGoldrick v. *Compagnie Generale Transatlantique*, 309 U. S. 430 5

	Page
N. W. Bell Tel. Co. v. *Nebraska State Ry. Com.*, 297 U. S. 471	5
New York Trust Co. v. *Riley*, 16 A. (2d) 772	6
Overby v. *Gordon*, 177 U. S. 214	6, 8
Pennoyer v. *Neff*, 95 U. S. 714	2
Putnam v. *Pitney*, 45 Minn. 242, 47 N. W. 790	8
Roberts v. *Bathhurst*, 112 F. (2d) 543	4
Salmon Falls Mfg. Co. v. *Midland Tire & Rubber Co.*, 285 Fed. 214	2
Sessions v. *Johnson*, 95 U. S. 347	3
Thormann v. *Frame*, 176 U. S. 350	2, 8
Tidal Oil v. *Flanagan*, 263 U. S. 444	1
Tilt v. *Kelsey*, 207 U. S. 43	8
Vogel v. *N. Y. Life Ins. Co.*, 55 F. (2d) 205	8
Warren v. *Hall's Exec.*, 10 La. 377	3
Wilkins v. *Elliott*, 9 Wall. 740	8

TEXTS CITED.

21 Am. Jur. 854	8
30 Am. Jur. 951	3
31 Am. Jur. 98, 99, 101	2
34 C. J. 1038	3
34 C. J. 1174	2
Freeman on Judgments, Vol. 1, Sec. 492	3
11 R. C. L. 429, 430	8
15 R. C. L. 1006	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1043

JULIAN RILEY AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C.T.A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED; AND COCA-COLA INTERNATIONAL CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Writ of certiorari will not be granted where the Federal questions decided by the lower court have long been settled.[1] An application of this principle requires the denial of the writ in this case.

The only Federal questions decided by the Supreme Court of Delaware are summarized by it in its opinion as follows:

"It is sufficient to say that the Georgia judgment, as a judgment in rem, binds only the property within

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[1] *Supreme Court Rule 38*, Par. 5(a); *Fleming* v. *Fleming*, 264 U. S. 29; *Tidal Oil* v. *Flanagan*, 263 U. S. 444; *City of Boston* v. *Jackson*, 260 U. S. 309; *King* v. *West Virginia*, 216 U. S. 92; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308.

the control of the court which rendered it, and the property in controversy here is not within its control; and

"as a judgment in personam, it cannot bind the appellant, for it was neither a party to that judgment, nor was it in privity with a party."

There is certainly no doubt about either of these propositions.

(The petition points out that there was one dissent in the Supreme Court of Delaware. This dissenting Justice filed no opinion. We cannot assume that he disagreed with the above. It is far more probable that his dissent was as to findings of fact.)

(a) A judgment in *rem* "binds only the property within the control of the Court which rendered it". This is settled by:

Thormann v. *Frame*, 176 U. S. 350;
Deway v. *Des Moines*, 173 U. S. 193;
Johnson v. *Powers*, 139 U. S. 156;
Pennoyer v. *Neff*, 95 U. S. 714;
Cooper v. *Reynolds' Lessee*, 10 Wall. 308;
Boswell's Lessee v. *Otis*, 9 How. 336;
Salmon Falls Mfg. Co. v. *Midland Tire & Rubber Co.*, 285 Fed. 214 (C. C. A. 6);
34 C. J. 1174;
31 *Am. Jur.* 98, 99, 101.

(b) A judgment in *personam* "cannot bind" one who "was neither a party to that judgment, nor was it in privity with a party".

This, of course, is elementary, but the following cases may be referred to:

Hansberry v. *Lee*, decided Nov. 12, 1940, No. 29, — U. S. —, 61 S. Ct. 115;
Johnson v. *Powers*, 139 U. S. 156;
Brooklyn, etc., R. R. v. *National Bank*, 102 U. S. 14;

Sessions v. *Johnson*, 95 U. S. 347;
Humes v. *Scruggs*, 94 U. S. 22;
Ex parte Howard, 9 Wall. 175;
Harris v. *Hardeman*, 14 How. 334;
15 *R. C. L.*, 1006;
30 *Am. Jur.* 951.

Nor is there any doubt about the fact that the personal representative of the decedent's estate is in no such privity with the heirs or distributees as to make a judgment against the heirs or distributees *res adjudicata* as to the personal representative. So far as we know the authorities are unbroken to the effect that a personal representative is not in such privity.[2]

The Supreme Court of Delaware, in so far as the Federal questions in this case are concerned, merely announced the above established principles and applied them to the case then before it in the only way they could be applied, namely: by holding that since the New York Administrator c.t.a. of the decedent's estate was not a party to the Georgia proceedings nor in privity with a party, the judgment in such Georgia proceedings could not be pleaded as an absolute bar against such administrator.

The court expressly declined to pass upon the question as to whether the individual heirs who were parties to the Georgia judgment would be bound thereby in subsequent proceedings. It declined to pass on this because the question was not involved. The court says:

"That court in the cases cited, was not, nor are we here, called upon to consider the operation of a judg-

[2] *Howard* v. *Williams*, 228 Ky. 259, 14 S. W. 2d 1096; *Buchan* v. *Williamson*, 142 Ga. 198, 82 S. E. 548; *Green* v. *Brown*, 146 Ind. 1, 44 N. E. 805; *Chamberlain* v. *Fay, et al.*, 205 Ia. 662, 216 N. W. 700; *Forbes* v. *Douglass, Admr.* 175 Mass. 191, 55 N. E. 847; *Warren* v. *Hall's Exec.* 10 La. 377; *Johnson's Admr.* v. *Longmire*, 39 Ala. 143; *Cole, Admr.* v. *Lafontaine, et al.*, 84 Ind. 446; *Dorr, Exec.* v. *Stockdale, et al.*, 19 Ia. 269; Vol. 1 *Freeman on Judgments*, §492; 34 C. J. 1038.

ment in a probate proceeding in one jurisdiction as to an estoppel against one who, although a party, to that proceeding, undertakes in a proceeding in another jurisdiction, affecting the same decedent's estate, to raise again the question of the decedent's domicile."

Nor was the court called upon to consider whether, if in fact such heirs and legatees were individually bound, (a point which was not in this case, and as to which therefore all relevant facts were not developed) such fact could have been pleaded for the purpose of moulding the scope of the relief granted in this case.

The petitioners herein did not ask the court to determine that the distributees were bound by the Georgia judgment, and therefore that the relief in this equity suit be moulded to enable the petitioners to retain in Georgia that portion of the stock in question which could fairly be allocated as the interest of those heirs and legatees, if any, who upon a full inquiry were shown to have been bound, after making provision for New York creditors, taxes, etc. It is wholly unnecessary to inquire whether this could have been pleaded. Nothing of the kind was pleaded, and nothing of the kind was decided. The issue raised by the petitioner was that the Georgia judgment was an absolute bar against the New York administrator, although that administrator was not a party to the Georgia proceeding.[3] The court was

[3] *Roberts* v. *Bathurst*, 112 F. (2d) 543, pressed by the opposing brief involved the equitable principle of avoiding circuity of action. The state of facts there presented is most unusual in that the Florida Executrix was also the sole beneficiary of the insurance involved, and there were "no debts to be paid." In the case at bar New York tax claims against the estate are deeply involved. Indeed, the appointment of the administrator c.t.a. in New York was in large part based on the efforts of the State of New York to obtain an administration there on the estate of a citizen of New York to protect its just tax claims. Also there is no showing that there are no creditors of the estate. If the equitable principle of

called on the pass upon this contention only, and it did pass upon this contention in accordance with long settled principles of constitutional law. This Court will not grant the writ of certiorari to decide questions that were not raised in the court below by the parties, or decided by the Court.[4]

Nor was the court below called on to pass upon the question of whether upon the administration of this property in New York by the Surrogate's Court, the Georgia judgment can be set up as controlling the distributive interests of those who were parties to the Georgia case.

The issue involved in the case, namely, whether the Georgia judgment was an absolute bar against one not a party to the Georgia proceedings, was raised at an early state of the case by a motion on behalf of the Georgia executors for judgment upon the pleadings (the pleadings having set forth in full the Georgia proceedings). The matter was fully argued before the late Chancellor Wolcott, and was decided by him adversely to the Georgia executors (R. 134). His decision on the question, to the effect that the Georgia proceedings were not binding on the New York administrator, for the reason that the latter was not a party to those proceedings, was discussed and approved

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avoiding circuity of action could have been applied here at all, it could have been applied only to the extent of the interest of such distributees as were shown to be bound. It could, in no event, constitute a complete bar to a New York administration. Moreover, a determination of the extent of such interest could have been made only if the pleadings had raised such an issue. No such pleadings were filed in this case. Furthermore, the legal principle involved is not one of Constitutional law, and raises no Federal question. The principle is merely the equitable doctrine of avoiding circuity of action. Nothing in the Federal Constitution *requires* state courts to follow that principle or to apply it in a particular way.

[4] *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430; *N. W. Bell Tel. Co.* v. *Nebraska State Ry. Com.*, 297 U. S. 471; *Chandler* v. *Manifold*, 290 U. S. 665; *Dorrance, et al.* v. *Pennsylvania*, 287 U. S. 660.

by the Supreme Court of the State of Delaware.[5] The Supreme Court said, in part, (*New York Trust Co.* v. *Riley*, 16 A. (2d) 772, 787):

> "The late Chancellor, in Coca-Cola International Corporation *v.* New York Trust Company, supra [2 A. (2d) 290], accurately stated the legal principles by which the case must be governed. * * *
>
> The learned Chancellor was of opinion * * * that the appointment of the administrator c.t.a. in New York, as well as the appointment of the executors in Georgia, were essentially judgments in rem, final and conclusive as to property located in the appointing jurisdiction, but the property located in this jurisdiction was not a subject matter within the operation of either of those judgments, citing Overby *v.* Gordon, 177 U. S. 214, 20 S. Ct. 603, 44 L. Ed. 741. Expressing no opinion on the question whether the Georgia judgment might not be pleaded as an estoppel against a party who was cited to appear and did appear in the probate of the will in solemn form in the Court of Ordinary of Fulton County, Georgia, if such party were to seek elsewhere to relitigate against the executors the question of the Georgia domicile, the Chancellor proceeded to say that such contention could not be made in the case before him for the reason that the New York Administrator was neither a party to the Georgia proceeding nor in privity with such party; and he concluded that there was power in the appropriate Delaware tribunals to determine, so far as the property located in this State was concerned, where the deceased testatrix was domiciled at the time of her death to the end that the local effects might be sent to the seat of domiciliary administration."

[5] Chancellor Wolcott's holding and opinion are not even mentioned by petitioners. In the court below they made the patently baseless contention that Chancellor Wolcott and not, on the motion for judgment, decided any of the questions of *res judicata* involved in the case. It will be observed that this contention was overruled by the Supreme Court of Delaware.

As will be seen from the holdings both of the Court of Chancery and of the Supreme Court of the State of Delaware, the courts below were not called upon to pass upon the question of whether, upon the administration of the property in controversy by the Surrogate's Court of the State of New York, the Georgia judgment may be set up as controlling the distributive interests of those who were parties to the Georgia case. That question was neither raised nor decided below, nor is it before this Court for determination.

When and if such question is raised it will be appropriate for the parties thus sought to be bound by the Georgia judgment to present any considerations or evidence pertinent to whether that judgment was originally binding on them, and pertinent to whether anything has since occurred to relieve the bar of the judgment if it ever existed. That was not done in the present record because it was not involved in the present case.

It is true, as pointed out in the petition for certiorari, that the Supreme Court of Delaware determined both that the Georgia judgment was not binding on the New York administrator, and that in point of fact the decedent was domiciled in New York at the time of her death. Both questions were involved in the case and both were determined by the court. The petition for certiorari seems to find great significance in the fact that the Supreme Court of Delaware first determined as a matter of fact the issue of fact as to the decedent's domicile, and then second in order in its opinion discussed the contention that the Georgia judgment was a bar. We see no significance in this. The reverse order might or might not have been a more technically logical way to proceed. Surely, however, there is no Federal question involved here.

Had the Supreme Court of Delaware, after finding as a matter of fact that the decedent was domiciled in the

New York at the time of her death, denied to the State of New York the power to control the domiciliary administration of the decedent's estate, then indeed a very grave question would have been presented, because the Supreme Court of Delaware, had it rendered any such decision, would have departed from fundamental ideas which have long governed the relation of the States to each other. Assuming, as we must assume, since the Supreme Court of Delaware so found on adequate proof, that the decedent was a citizen of New York at the time of her death, there is no way possible under our constitutional system by which the State of Georgia, through proceedings in its own court, could have deprived the State of New York of the power in its courts of establishing a domiciliary administration of the decedent's estate.[6] There is no need, however, to grant the writ of certiorari where the court in this respect merely conformed to established constitutional principles as it did in the case at bar.

The petition for certiorari creates an inaccurate impression as to the nature of the New York proceedings in the Surrogate's Court. It repeatedly speaks of them as *ex parte*. Actually, the appointment of the New York Trust Company, both as temporary and as permanent administrator, was made after full notice in complete accordance with the New York statutes, through personal service

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[6] *Baker* v. *Baker-Eccles Co.*, 242 U. S. 394; *Burbank* v. *Ernst*, 232 U. S. 162; *Tilt* v. *Kelsey*, 207 U. S. 43; *Overby* v. *Gordon*, 177 U. S. 214; *Thormann* v. *Frame*, 176 U. S. 350; *Re Dorrance's Estate*, 170 A. 601 (N. J.):

Subject only to the right of a foreign state to administer property within its borders for the protection of its own citizens, the domiciliary representative becomes invested with the title to all of the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts and making distribution of the residue according to the law of the place of domicile or the directions of the will as qualified by law.

Wilkins v. *Elliott, Admr.*, 9 Wall. 740; *Vogel* v. *N. Y. Life Ins. Co.*, 55 F. (2d) 205, Cert. denied 287 U. S. 604; *Putnam* v. *Pitney*, 45 Minn. 242, 47 N. W. 790; 21 Am. Jur. 854; 11 R. C. L. 429, 430.

of citation on all parties in interest outside the State (R. 86). The notice was actual and as complete as it is possible to give to non-residents, and it is wholly misleading to speak of the proceedings thereafter as *ex parte*.

After hearing evidence fully the Surrogate's Court determined that the decedent was domiciled in New York at the time of her death (R. 127). It is possible that opposing counsel, when they speak of these proceedings being *ex parte*, merely mean that the opposing interest did not actually contest on the point of domicile. If so, however, the Georgia proceedings on which opposing counsel rely must also be spoken of as *ex parte* since no one there contested the issue of domicile. It appears from the report of that case [7] that Hungerford's counsel felt that domicile was not in issue there and offered no evidence with respect thereto. The Supreme Court of Georgia treated domicile as in issue, but there must have been substantial basis for the contrary view under the Georgia law, since the Chief Justice of that Court filed a dissenting opinion on this particular point. However that may be, the only courts in which an actual contest as to the decedent's domicile has ever been tried are the Delaware courts, and the final determination there has been that the domicile was in New York.

Nor is any clear idea of the proceedings in New York given by a statement which omits to say that before the appointment of the permanent administrator the State of New York through its tax authorities had intervened to seek an administration in New York of the estate of a citizen domiciled in New York so that its just claims to inheritance and other taxes could be protected (R. 76). With reference to this the Supreme Court of Delaware appropriately says:

> "The appellant, however, is far more than being the representative of a mere creditor or tax claim-

[7] *Hungerford* v. *Spalding*, 183 Ga. 547.

ant. Any claim that the State of New York may have for inheritance taxes or other taxes is not the basis of its right to be heard on the question of domicile. That right proceeds from the fact that the decedent was its domiciled citizen at the time of her death; and the appellant, appointed by authority of its proper court, is its arm to gather together, in so far as is permitted by law, the personal property of the deceased, and to administer and distribute the property according to her will and the laws of the State. Being the seat of domiciliary administration, it is not compelled to press its claim for taxes in a jurisdiction of ancillary administration."

It is impossible to find any novel or unsettled principle of law in this statement.

As a matter of fact, the action of the Delaware Court having been correctly understood, and a correct statement of the issues actually involved in that court having been made, it becomes too obvious for argument that on the supposed Federal questions the court merely applied long established principles of law. There is no occasion for this Court to burden itself with another case in order to declare that which is already definitely settled.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 81

JULIAN RILEY AND HUGHES SPALDING, AS EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, AS ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, RESPONDENT.

BRIEF FOR THE RESPONDENT

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SUBJECT INDEX

Page

STATEMENT 1

ANALYSIS OF DECISION OF SUPREME COURT OF DELAWARE 3

GEORGIA JUDGMENT NOT BINDING IN DELAWARE ON NEW YORK ADMINISTRATOR C.T.A. 7

Georgia Judgment as Judgment In Rem Binds Only Property Within Jurisdiction of Court Rendering Judgment. Stock Here Involved Not Within Jurisdiction of Georgia Court . 7

As a Judgment In Personam It Binds Only Parties And Their Privies 10

New York Administrator C.T.A. Not a Party to Georgia Proceedings and not in Privity with a Party; Hence not Bound 12

PETITIONERS' THEORY ON WHICH IT IS CLAIMED NEW YORK ADMINISTRATOR C.T.A. BOUND IS UNSOUND 16

In Stating Georgia Judgment Settles Succession and is Binding on World, Petitioners confuse Operation of Judgment in rem with Operation of Judgment in Personam. As Judgment in Rem Binding Only on Property Within State of Georgia. As Judgment in Personam Not Binding on Any but Parties and Privies 16

Chicago, Rock Island & Pacific Ry. v. Schendel, 270 U. S. 61, and Other Cases Dealing with "Substantial Identity" Rule, Not Applicable Here 17

Baker v. Baker, Eccles & Co., 242 U. S. 394, Does Not Support Petitioners' Position 18

That New York Administrator Could Not Have Participated in Georgia Proceedings Does Not Make Georgia Judgment Binding on Administrator. To Make Such Judgment Binding Would Violate the Due Process Provision 20

Davis v. Davis, 305 U. S. 32, and Similar Late Cases from This Court, Dealt with Binding Effect of Judgments on Parties and Their Privies. They Are Not in Point Where a Judgment Is Asserted Against One Neither a Party Nor a Privy 22

SUBJECT INDEX—Continued

Page

Roberts v. Bathurst, 112 F. (2d) 543, Turned on Equitable Doctrine of Avoiding Circuity of Action Where No Creditors Were at Interest. Not Applicable Where Creditors and Tax Claimants Exist. Also No Constitutional Requirement That State Courts Should Apply Equitable Doctrine . . 22

THERE IS NO "SUBSTANTIAL IDENTITY" BETWEEN THE ADMINISTRATOR C. T. A. AND THE DISTRIBUTEES 24

Creditors and Tax Claimants in New York 25

Administrator C.T.A Was Appointed Primarily on Application of New York Tax Commission as a Necessary Step in the Collection of Tax Claims Against the Estate of a Decedent of That State 25

NEW YORK HAS A SOVEREIGN RIGHT TO ADMINISTER ESTATE OF ITS DECEASED CITIZEN. NO ACTION BY GEORGIA COURTS COULD BAR THIS RIGHT 27

NEW YORK COULD NOT COLLECT ITS ESTATE TAXES THROUGH GEORGIA COURTS 29

Georgia Has a Reciprocity Statute 30

New York Does Not Permit Other States to Proceed in Its Courts to Collect Taxes. Hence Under Reciprocity Statute New York Could Not Proceed in Georgia Court . . 30

FEDERAL CONSTITUTION DOES NOT FORESTALL CONFLICTING DECISIONS OF DOMICILE BY DIFFERENT STATES 33

DELAWARE COURT BOUND TO GIVE GEORGIA JUDGMENT ONLY SUCH "FAITH AND CREDIT" AS IT WOULD "HAVE BY LAW OR USAGE IN THE COURTS" OF GEORGIA. PETITIONERS' FAILURE TO PROVE GEORGIA LAW OR USAGE DEFEATS THEIR CLAIM . 35

Georgia Judgment Entitled Only to Such "Faith and Credit" as It Would Have in Georgia Courts 35

Statement of Questions Under Georgia Law, Which Must Be Known to Determine What Effect This Judgment Would Have in Georgia. Record Silent as to Georgia Law in These Respects 36

In Reviewing Decision of State Court, Supreme Court of the United States Will Not Take Judicial Cognizance of Law of Another State 37

SUBJECT INDEX—Continued

Page

One Asserting State Judgment Denied Full Faith and Credit Must, as a Part of His Case, Prove Relevant Law of State in Which Judgment Rendered 38

If Georgia Law Examined It Would Appear That Judgment Against Distributees Does Not Bind Representative of Estate 39

Also, That Judgment May Be Collaterally Attacked for Lack of Jurisdiction of the Subject-Matter 39

While Georgia Law Controlling, It Is Nevertheless Noted That the Supreme Court of the United States Recognizes Distinction Between Fundamental Lack of Jurisdiction of Subject-Matter and Merely Quasi Jurisdictional Facts in Determining Whether Judgment May Be Collaterally Attacked 42

DOMICILE IS MIXED QUESTION OF LAW AND OF FACT. GEORGIA JUDGMENT DETERMINING DOMICILE UNDER GEORGA LAW NOT CONCLUSIVE AS TO DOMICILE UNDER DELAWARE LAW. DELAWARE PROPERLY APPLIED ITS OWN LAW 46

Domicile Mixed Question of Law and of Fact as to Which Different Determinations May Be Made by Different States on the Same State of Facts 46

This Recognized by Decisions of This Court 47

Burden on Petitioners to Show Georgia Law of Domicile. This Burden Not Carried 49

If Georgia Law Examined It Will Be Found to Vary From Delaware Law on Point of Domicile 49

Each State Determines Its Own Law of Domicile for Itself . 50

CONCLUSION 50

TABLE OF CASES AND STATUTES

Page

Abelman v. Booth, 21 How. 506 28

Adam v. Saenger, 303 U. S. 59 37

Allen v. Baker, 188 Ga. 696, 4 S. E. (2d) 642 40

Andrews v. Andrews, 188 U. S. 14 45

Arnold v. Arnold, 62 Ga. 627 10

Baker v. Baker, Eccles & Co., 242 U. S. 394 . . . . . 10, 18

Bliss' Estate, Matter of, 121 Misc. 773, 202 N. Y. S. 185 . . . 31

Boswell's Lessee v. Otis, 9 How. 336 8

Bouree v. Trust Francais, Etc. Oil Co., 14 Del. Ch. 332, 127 A. 56 9

Bowles v. R. G. Dun-Bradstreet Corp., 12 A. (2d) 392 (Del. Ch.) 9

Brafman v. Brafman, 144 Md. 413, 125 A. 161 29

Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265 21

Brooklyn, Etc. R. R. Co. v. National Bank, 102 U. S. 14 . . . 12

Buchan, Admr. v. Williamson, 142 Ga. 198, 82 S. E. 548 . 13, 14, 15, 39

Buckner v. Finley, 2 Pet. 586 28

Burns Mortgage Co. v. Fried, 292 U. S 487 48

Cantor v. Sachs, 18 Del. Ch. 359, 162 A. 73 9

Chamberlain v. Fay, et al, 205 Ia. 662, 216 N. W. 700 12

Chicago, Etc. R. R. Co. vs. Wiggins Ferry Co., 119 U. S. 615 . . 37

Chicago, Rock Island & Pacific Ry. Co. v. Schendel, 270 U. S. 611 17

Chicot Co. Drainage Dist. v. Baxter State Bk., 308 U. S. 371 . . 44

Cole, Admr. v. LaFontaine, et al, 84 Ind. 446, 151 N. E. 342 . . 12

Collector v. Day, 11 Wall. 113 28

Colorado v. Harbeck, 232 N. Y. 71, 133 N. E. 357 31

Commonwealth of Pennsylvania v. Ravenel, 21 How. 103 . . . 46

Cooper v. Reynolds' Lessee, 10 Wall. 308 8

Cornell, In re, 267 N. Y. 456, 196 N. E. 396, cert. denied 297 U. S. 708 5

Davis v. Davis, 305 U. S. 32 22

TABLE OF CASES AND STATUTES—Continued

	Page
Dewey v. Des Moines, 173 U. S. 193	8
Donovan, Estate of Mary, N. Y. L. J., June 18, 1941, p. 2739	32
Dorr v. Stockdale, et al, 19 Ia. 269	12
Durden v. Durden, 191 Ga. 404, 12 S. E. (2d) 305	40
Elliott v. Elliott, 181 Ga. 545, 182 S. E. 845	40
Ellis v. Penn Beef Co., 9 Del. Ch. 213, 80 A. 666	9
Erie Railroad Co. v. Tompkins, 304 U. S. 64	50
Fall v. Eastin, 215 U. S. 1	45
Forbes v. Douglass, Admr., 175 Mass. 191, 55 N. E. 847	12
Frick v. Pennsylvania, 268 U. S. 473	5
Gasquet v. Lapeyre, 242 U. S. 367	38
Green v. Brown, 146 Ind. 1, 44 N. E. 805	12
Griffin v. McCoach, Trustee, ... U. S. ....., 85 L. ed. 972	8
Hanley v. Donoghue, 116 U. S. 1	37
Hansberry v. Lee, 311 U. S. 32	11, 16
Harris v. Hardeman, 14 How. 334	12
Hooks v. Brown, 125 Ga. 122, 53 S. E. 583	21
Howard, Ex parte, 9 Wall. 175	12
Howard v. Williams, 228 Ky. 259, 14 S. W. (2d) 1096	12
Humes v. Scruggs, 94 U. S. 22	12
Hunt v. Drug, Inc., 5 W. W. Harr. (Del.) 332, 156 A. 384	9
Hutchins v. State Bank, 12 Metc. (Mass.) 421	4
Jellenik v. Huron Copper Mining Co., 177 U. S. 1	10
Johnson, Admr. v. Longmire, 39 Ala. 143	12
Johnson v. Powers, 139 U. S. 156	8, 12
Jones v. Habersham, 107 U. S. 174	4
Keith v. Willers Truck Service, Inc., 64 S. D. 274, 266 N. W. 256, 104 A. L. R. 1471	18
Klaxon Co. v. Stentor Electric Mfg. Co., ... U. S. ....., 85 L. ed. 969	50

TABLE OF CASES AND STATUTES—Continued

Page

Lloyd v. Matthews, 155 U. S. 222 37

Martin's Estate, In re, 136 Misc. 51, 240 N. Y. S. 393, Aff. 255 N. Y. 359, 174 N. E. 753 . . . . . 30, 31

Mayor, Aldermen & Commonalty of City of N. Y. v. Miln, 11 Pet. 102 28

Montgomery v. Suttles, 191 Ga. 781, 13 S. E. (2d) 781 40

Morgan v. Ownbey, 6 Boyce 379, 100 A. 411, 7 Boyce 297, 105 A. 838 9

McCully v. Cooper, 114 Cal. 258, 46 Pac. 82 29

McEwen v. McEwen, 50 N. D. 662, 197 N. W. 862 29

Noble v. Union River Logging R. Co., 147 U. S. 165 . . . 42, 44, 45

Nye Odorless Incinerator Corp. v. Felton, 5 W. W. Harr. 236, 162 A. 506 39

Nye Odorless Incinerator Corp. v. Nye Odorless Crematory Co., 18 Del. Ch. 179, 156 A. 176 9

Overby v. Gordon, 177 U. S. 214 . . . . . 7, 41

Penington v. Commonwealth Hotel Construction Corp., 18 Del. Ch. 170, 156 A. 259 9

Pennoyer v. Neff, 95 U. S. 714 8

Peoples Bank v. Cleveland, 117 Ga. 908, 44 S. E. 20 10

Perrine v. Pennroad Corp., 19 Del. Ch. 368, 168 A. 196 9

Petersen v. Chemical Bank, 32 N. Y. 21 4

Peyton v. Wm. C. Peyton Corp., 21 Del. Ch. 299, 187 A. 849 . . 9

Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790 4

Rackemann v. Taylor, 204 Mass. 394, 90 N. E. 552 29

Renaud v. Abbott, 116 U. S. 277 37

Roberts v. Bathurst, 112 F. (2d) 543 . . . . . 22, 24

Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 . 8

Sessions v. Johnson, 95 U. S. 347 12

Skinner v. Educational Pictures Sec. Corp., 14 Del. Ch. 417, 129 A. 857 9

TABLE OF CASES AND STATUTES—Continued

Page

Spitzer, Matter of, 170 Misc. 161, 9 N. Y. S. (2d) 868 32

Sovereign Camp Woodmen of the World v. Bolin, 305 U. S. 66 . 22

State of N. H. v. State of La., 108 U. S. 76 28

State of R. I. v. Commonwealth of Mass., 12 Pet. 657 28

Stoll v. Gottlieb, 305 U. S. 165 22

Sweeney v. Dist. of Columbia, 113 F. (2d) 25 46

Texas v. Florida, 306 U. S. 398 47

Thomas v. Morrisett, 76 Ga. 384 . . . . . 14, 15

Thormann v. Frame, 176 U. S. 350 . . . . . 6, 8

Tilt v. Kelsey, 207 U. S. 43 . . . . . 16, 21

Union National Bank v. Topkis Bros. Co., ... Del Ch. ....., 2 A. (2d) 148 9

United States v. U. S. Fidelity & Guaranty Co., 309 U. S. 506 . 22, 44

Vogel v. N. Y. Life Ins. Co., 55 F (2d) 205, cert. denied 287 U. S. 604 4

Warren v. Hall's Exec., 10 La. 377 12

Wightman v. San Francisco Bay Toll-Br. Co., 16 Del. Ch. 200, 142 A. 783 9

Wilkins v. Ellett, 108 U. S. 256 28

Worcester County Tr. Co. v. Riley, 302 U. S. 292 . . . 33, 34, 47

TEXTS CITED

21 Am. Jur. 398 28

30 Am. Jur. 951 12

31 Am. Jur. 98, 99, 101 8

Beale on Conflict of Laws, Vol. 1, p. 105 46

19 C. J. p. 441, note 95 46

24 C. J. 1118 4

34 C. J. 1038 12

34 C. J. 1174 8

TABLE OF CASES AND STATUTES—Continued

	Page
Croswell, Executors & Administrators, 152	4
Freeman on Judgments, Vol. 1, §492	12
L. R. A., 1918A, Ann. p. 456	21
1 Page on Wills (2d Ed.) p. 931	21
Restatement, Conflict of Laws, Sec. 477 (2)	51
11 R. C. L. 69	29
11 R. C. L. 429-430	4
15 R. C. L. 1006	12

STATUTES CITED

Delaware Corp. Law, §73, Revised Code 1935, §2105	9
Ga. Code, §6-1611	15
Ga. Code, §79-401	49
Ga. Code, §79-403	49
Ga. Code, §110-701	40
Ga. Code, §110-708	40
Ga. Code, §110-709	40
Ga. Laws, Extra Session, 1937-38, p. 102	30
28 U. S. C., §687, 1 Stat. 122	35

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 81

JULIAN RILEY AND HUGHES SPALDING, AS EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, AS ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, RESPONDENT.

BRIEF FOR THE RESPONDENT

Statement of Case

We concur in petitioners' statement that the sole question involved before this Court is whether the Supreme Court of Delaware denied full faith and credit to a judgment of the Court of Ordinary of Fulton County, Georgia. The claim of petitioners is that this judgment binds respondent.

Respondent asserts on the contrary that it was not a party to the Georgia proceedings, and is not in privity with any party, and that for this, and other reasons to be hereinafter discussed, it is in nowise concluded by the Georgia judgment with respect to the decedent's domicile.

Petitioners raise no question about the sufficiency of the evidence to establish what the Supreme Court of Delaware held to be a fact, that in truth the decedent was domiciled in New York at the time of her death. No such question could be raised in this Court under this record. The contention of the petitioners is that the Delaware court was foreclosed by this Georgia judgment from considering this evidence at all.

We wish briefly to supplement the statement made by petitioners in their brief with respect to the Georgia proceedings. There was in the Georgia courts no actual contest with respect to the decendent's domicile. The proceedings in the Georgia courts were to probate the will of the decedent, and Hungerford, the husband of the decedent, in those proceedings raised the contention that domicile was not at issue, and should not be passed upon since, admittedly, there was real estate located in Fulton County, Georgia, which made it necessary to probate the will there. His contention in this respect was afterwards overruled by the Supreme Court of Georgia, but with the Chief Justice dissenting. (R. 109). What we wish to point out, however, is that there was actually no contested trial in Georgia with respect to the true domicile of the decedent.

The statement in petitioners' brief with respect to the appointment in New York of the Administrator c. t. a., is inaccurate, in that it is there stated that the appointment was ex parte. This was not the case. The appointment was made after non-resident service on all parties at issue. They

did not appear, but they received adequate notice for a proceeding in rem, such as the appointment of an administrator c. t. a., and had ample opportunity to appear. Petitioners also omit to state, with respect to this appointment, that the proceedings to probate the will in New York, and to appoint an administrator c. t. a. in that State, were initiated by the New York Tax Commission as the first step toward administering the estate of a deceased citizen of New York and collecting its taxes against that estate. As we later in this brief make a more complete statement with respect to these New York proceedings we do not here burden the brief with reference to the record.

Petitioners' statement also points out that one of the members of the Delaware Supreme Court dissented from the present judgment. This is correct, but as no dissenting opinion was filed we cannot assume that his dissent was on the constitutional point now before this Court. The issue of fact as to domicile was heatedly contested in Delaware, that being the only court in which an actual contest with respect to the decedent's domicile has ever been tried. It seems probable that this dissent was on this question of fact rather than on the constitutional point now before this Court, but as to this we have no way of speaking with certainty.

Decision of the Supreme Court of Delaware.

An analysis of the decision of the Supreme Court of Delaware in this case is here necessary.

The case involved an interpleader between representatives of the estate of the decedent appointed by different States. The decedent's will had been probated in Georgia and the executors named in the will had qualified under the law of that State. The decedent's will had also been

probated in New York. The executors had refused to qualify there and an administrator c. t. a. had been appointed. Both the Georgia executors and the New York administrator c. t. a. claimed the right to have certain shares of stock owned by the decedent in the Coca-Cola International Corporation issued to them. This Delaware corporation brought this suit for an interpleader to determine for its own protection to whom these shares should be issued. The Delaware courts had jurisdiction under the Delaware statutes because the corporation was one formed under the Delaware law. Personal appearances were entered by both the Georgia executors and the New York administrator c. t. a., and no question of jurisdiction arises in the case.

There being no Delaware creditors of the decedent and no claimants in the State of Delaware, it was conceded by all parties that, while no doubt the State of Delaware could appoint an ancillary administrator in that State to administer these shares, there was no necessity for its doing so. The Delaware court, however, was faced with the question as to whether these shares should be sent to Georgia for administration by the executors or to New York for administration by the New York administrator c. t. a.

The first point ruled by the Delaware court was that these Delaware shares of stock should be sent for administration to the domiciliary representative of the decedent's estate.

As no question arises over the correctness of this rule we do not discuss it, but note in the margin authorities to the same effect.[1]

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[1] 11 R. C. L. 429-430; 24 C.J.1118; Petersen v. Chemical Bank, 32 N.Y.21; Vogel v. New York Life Ins. Co., 55 F. (2d) 205 (C.C.A.5); certiorari denied 287 U. S. 604; Croswell, Executors and Administrators, 152; Hutchins v. State Bank, 12 Metc. (Mass) 421; Putnam v. Pitney, 45 Minn.242, 47N.W.790; Jones v. Habersham, 107 U. S. 174.

The court also construed the relevant Delaware statutes as adopting the rule that assets of a deceased nonresident should be sent to the domiciliary representative. (R. 226).

It should be noted, however, that this is in no sense a rule of Federal constitutional law. There is nothing in the Federal Constitution which requires a state having personal assets of a decedent in its jurisdiction to send such assets for administration to the domiciliary representative for administration. The rule that a state will follow this course is merely a rule of comity, not of constitutional law. Under some circumstances a state may depart from this rule. See *In re Cornell*, 267 *N. Y.* 456, 196 *N. E.* 396; *certiorari denied*, 297 *U. S.* 708; *Frick v. Pennsylvania*, 268 *U. S.* 473.

The Supreme Court of Delaware next determined that the decedent had been domiciled in the State of New York at the time of her death, and hence that the New York administrator was the domiciliary representative of the estate. The Supreme Court of Delaware follows the traditional Chancery practice on appeal, in that the whole case is considered de novo. While according weight to findings of the Chancellor, the Supreme Court finally, for itself, determines questions of fact. The opinion of the Supreme Court in this record contains a full review of the evidence in the case on this point of domicile. Its findings on the evidence are amply sustained by the record, but as this Court will not review this finding of fact we do not undertake to summarize the evidence in this brief. It is sufficient to say that on ample evidence the Supreme Court of Delaware as a matter of fact found the domicile of the decedent to have been in the State of New York. From this it would follow as an inevitable conclusion of law that the New York administrator c. t. a. was the domiciliary representative of the estate.

The third point determined by the Supreme Court of Delaware is the only one now before this Court, namely: The Supreme Court of Delaware held that the New York administrator c. t. a. was not concluded by a Georgia judgment of the Court of Ordinary of Fulton County, which admitted to probate the will of the decedent upon a determination that the decendent was domiciled in Fulton County, Georgia, at the time of her death. It is now claimed that this ruling of the Supreme Court of Delaware denied to such Georgia judgment the full faith and credit required by the Federal Constitution. This point alone is before this Court for consideration.

While the Supreme Court of Delaware discusses the matter fully, one paragraph in its opinion accurately summarizes its ruling. Having pointed out that the New York administrator was not a party to the Georgia proceedings, and was not in privity with any party to those proceedings, the court says: (R. 230)

> "It is sufficient to say that the Georgia judgment, as a judgment in rem, binds only the property within the control of the Court which rendered it, and the property in controversy here is not within its control; and as a judgment in personam, it cannot bind the appellant, for it was neither a party to that judgment, nor was it in privity with a party."

This statement clearly was adopted from the language of this Court in *Thormann v. Frame,* 176 *U. S.* 350, where the Court, in speaking of a judgment of a probate court in Louisiana, said:

> "Now a judgment in rem binds only the property within the control of the court which rendered it; and a judgment in personam binds only the parties to that judgment and those in privity with them."

Delaware Court Correctly Determined That Georgia Judgment Could Not Be Pleaded in Bar Against the New York Administrator C. T. A.

As pointed out in the analysis of the decision of the Supreme Court of Delaware on this point, that decision rests upon three propositions:

(a) The Georgia judgment as a judgment in rem binds only property within the jurisdiction of the court rendering the judgment;

(b) As a judgment in personam it binds only parties and their privies;

(c) The New York administrator c. t. a. not being a party to the Georgia proceedings nor in privity with a party, is not barred by the judgment.

It is submitted that in thus holding, the Supreme Court of Delaware merely followed fully established principles of law as to which there will be found to be no conflict in the authorities. We consider them briefly:

(a)

In *Overby v. Gordon*, 177 *U. S.* 214, this Court had occasion to consider the operation of a Georgia judgment of probate which undertook to determine domicile. This Court announced that such a judgment was a judgment in rem, and while fully binding on all property within the State of Georgia, and hence within the jurisdiction of the court, it could have no binding effect as a judgment in rem outside of that State.

This Court has recently had occasion to announce a construction of the case of *Overby v. Gordon*. It states the exact proposition for which we contend.

In *Griffin v. McCoach, Trustee,* — *U. S.* —, 85 *L. ed.* 972, decided June 2, 1941, the Court says:

> "Overby v. Gordon holds that the adjucation of a probate court of Georgia that the decedent was a resident of that state was a proceeding in rem and did not bind the courts of the District of Columbia in a suit to determine anew decedent's domicil."

There appears to be no dispute whatever in the authorities over the proposition that a judgment of probate is primarily a judgment in rem, also that a judgment in rem has no binding effect on property outside of the jurisdiction in which it was rendered. Without unnecessarily laboring the point, therefore, we cite the following:

Thormann v. Frame, 176 *U. S.* 350;
Dewey v. Des Moines, 173 *U. S.* 193;
Johnson v. Powers, 139 *U. S.* 156;
Pennoyer v. Neff, 95 *U. S.* 714;
Cooper v. Reynolds' Lessee, 10 *Wall.* 308;
Boswell's Lessee v. Otis, 9 *How.* 336;
Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 *F.* 214, *C. C. A.* 6;
34 *C. J.* 1174;
31 *Am. Jur.,* 98, 99, 101.

In its opinion the Supreme Court of Delaware says:

> "It is admitted that the situs of the shares of stock in controversy is in this State." (R. 325)

In view of this admission, shown by the record on which the Supreme Court of Delaware acted, and was justified in acting, no question of situs can arise in this Court. It may be well to point out, however, that under the controlling Delaware law this admission that the situs of the stock was in Delaware was inevitable.

Section 73 of the Delaware Corporation Law (*Revised Code of Delaware*, 1935, §2105) is as follows:

> "For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of ownership of capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

Delaware decisions which are noted in the margin have given this section a broad interpretation as meaning that for all purposes except taxation, shares in a Delaware corporation are in legal contemplation situated in the State of Delaware.[2]

Delaware has never adopted the Uniform Stock Transfer Act, and the controlling statute is the one above quoted. All parties acquiesced in its validity and controlling effect, and it is, of course, far too late to raise any question now as to its constitutionality. No such question, however, could be raised as this Court has heretofore determined that it is entirely competent for a State incorporating a company to make a provision similar to this as to the situs of its shares.

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[2]Bouree v. Trust Francais, Etc., Oil Co., 14 Del.Ch. 332, 127 A. 56 (1924); Hunt v. Drug, Inc., 5 W. W. Harr. (Del.) 382, 156 A. 384 (1931); Penington v. Commonwealth Hotel Construction Corp., 18 Del. Ch. 170, 156 A. 259 (1931); Cantor v. Sachs, 18 Del. Ch. 359, 162 A. 73 (1932); Ellis v. Penn Beef Co., 9 Del. Ch. 213, 80 A. 666 (1911); Wightman v. San Francisco Bay Toll-Bridge Co., 16 Del. Ch. 200, 142 A. 783 (1928); Perrine v. Pennroad Corp., 19 Del. Ch. 368, 168 Atl. 196 (1933); Morgan v. Ownbey, 6 Boyce 379, 100 A. 411 (1916); 7 Boyce 297, 105 A. 838 (1917); Union National Bank v. Topkis Bros. Co., 2 A. (2d) 148 (Del. Ch. 1938); Nye Odorless Incinerator Corp. v. Nye Odorless Crematory Co., 18 Del. Ch. 179, 156 A. 176 (1931); Peyton v. Wm. C. Peyton Corp., 21 Del. Ch. 299, 187 A. 849 (1936); Bowles v. R. G. Dun-Bradstreet Corp., 12 A. (2d) 392 (Del. Ch. 1940); Skinner v. Educational Pictures Securities Corp., 14 Del. Ch. 417, 129 A. 857 (1926).

See *Jellenik v. Huron Copper Mining Co.*, 177 *U. S.* 1. Also, as to the power of a State incorporating a company to exercise this control over its shares of stock, see, *Baker v. Baker, Eccles & Co.*, 242 *U. S.* 394.

There is no suggestion in the record that Coca-Cola International Corporation, the shares of which are involved, was qualified to do business in Georgia, or did business there.

Georgia law, if relevant, also fixes the situs of these shares at the home office of the company issuing them, namely, in Delaware. There is no controlling statute on this point in Georgia, but the Georgia decisions are definite in this respect.

See:

Arnold v. Arnold, 62 *Ga.* 627;
Peoples Bank v. Cleveland, 117 *Ga.* 908, *particularly at p.* 916.

It thus appears that by admission of the parties, by Delaware law, and by Georgia law, the shares here involved were not property within the State of Georgia. Hence the Georgia judgment, as a judgment in rem, had no effect upon them.

(b)

It is, of course, true that an in rem proceeding may develop contests inter partes as to which adjudications are made, and the resulting judgment may to that extent and in that respect operate as a judgment in personam. The Supreme Court of Delaware recognized this proposition and in addition to considering the operation of the Georgia judgment as a judgment in rem, also gave consideration to that judgment as one in personam. In this respect also, however, the court properly held that the judgment could

not be pleaded as a bar against the New York administrator c. t. a.

It is a fundamental principle with respect to judgments in personam that they bind only parties and their privies. Indeed, the rule goes to the full extent of declaring that it is an unconstitutional deprivation of due process of law to enforce such a judgment against anyone not a party thereto or in privity with the party.

Thus the Court in the late case of *Hansberry v. Lee*, 311 *U. S.* 32, declared at p. 40:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U. S. 714; I Freeman on Judgments (5th ed.) 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. Sec. 905, 28 U. S. C. Sec. 687, prescribe, *Pennoyer v. Neff, supra; Lafayette Ins. Co. v. French*, 18 How. 404; *Hall v. Lanning*, 91 U. S. 160; *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. *Postal-Telegraph Cable Co. v. Newport*, 247 U. S. 464, *Old Wayne Mutual Life Assn. v. McDonough*, 204 U. S. 8."

Here again we are dealing with a principle that is so entirely free from conflict in the authorities that it is unnecessary to discuss it at length. The following additional authorities will be found in point:

Johnson v. Powers, 139 *U. S.* 156;
Brooklyn, Etc. R. R. Co. v. Nat'l Bk., 102 *U. S.* 14;
Sessions v. Johnson, 95 *U. S.* 347;
Humes v. Scruggs, 94 *U. S.* 22;
Ex Parte Howard, 9 *Wall.* 175;
Harris v. Hardeman, 14 *How.* 334;
15 *R. C. L.* 1006;
30 *Am. Jur.* 951.

(c)

The administrator or executor of an estate is not in privity with the heirs or distributees and a judgment against the latter does not bind the former.

The universally recognized rule to this effect is thus stated in 34 *C. J.* 1038:

> "A judgment in a suit in which the heirs or devisees only are parties, will not conclude the personal representatives."

In *Freeman on Judgments, Vol.* 1, *Sec.* 492, the same rule is declared.

> "An administrator or executor is not ordinarily bound by a judgment against an heir or distributee, since he does not claim through or under him."

As illustrative of the rule, see:

Howard v. Williams, 228 *Ky.* 259, 14 *S. W.* (2*d*) 1096;
Green v. Brown, 146 *Ind.* 1, 44 *N. E.* 805;
Chamberlain v. Fay, et al, 205 *Ia.* 662, 216 *N. W.* 700;
Forbes v. Douglass, Admr., 175 *Mass.* 191, 55 *N. E.* 847;
Warren v. Hall's Exec., 10 *La.* 377;
Cole Admr. v. Lafontaine, et al, 84 *Ind.* 446, 151 *N. E.* 342;
Dorr v. Stockdale, et al., 19 *Ia.* 269;
Johnson, Admr. v. Longmire, 39 *Ala.* 143.

The decision of the Supreme Court of Georgia in *Buchan, Admr. v. Williamson,* 142 *Ga.* 198, 82 *S. E.* 548 (1914), is here of great importance because it clearly announces the above rule. The special importance of a Georgia decision in this connection grows out of the rule that the full faith and credit provision in the Federal Constitution and the legislation of Congress in enforcement thereof, do not require that one state should give to the judgment of a sister state any greater force or effect than would be given such judgment in the state in which it was rendered. A more complete statement on this point is presented in another point in this brief. Its immediate application here is that when it appears clearly that under the Georgia law judgments affecting heirs and distributees only do not bind the personal representatives, then nothing in the Federal Constitution requires another state to treat such Georgia judgment as having the effect of binding the personal representative, since it would not have that effect in the state in which it was rendered.

Buchan v. Williamson, supra, clearly settled this point in Georgia, in conformity to the unbroken line of authority elsewhere. Under the Georgia law, title to land descends to the heirs-at-law, subject to the right of the administrator to administer the land. The heirs-at-law of the decedent there had brought a suit for a certain tract of land belonging to the decedent, the heirs claiming title under him. The court had adjudicated that the defendant in that suit had the better title. *Buchan v. Williamson, supra,* was a suit by the administratrix against the same defendant for the same piece of land, again asserting the decedent's title. An effort was made to set up the judgment against the heirs in the former suit. The Georgia court held that the administratrix was not bound by this judgment. The court says:

> "It thus appears that the parties plaintiff in the two suits were not identical. . . ."

The Court will bear in mind that all of the heirs-at-law had been parties to the first suit.

The court further says:

> "If the administrator should recover, and there should remain any property after paying the debts, whether the former judgment would conclude the heirs on distribution of the estate is not now for decision."

This is exactly the conclusion which the Delaware Supreme Court reached in the case at bar. (R. 228). That court pointed out that it was not then called upon to decide whether the distributees who were parties to the Georgia proceedings would be bound when the Surrogate's Court in New York came to distribute such excess as there might be out of the proceeds of these securities after creditors and taxes had been paid. The Delaware Court was, therefore, giving the Georgia judgment exactly the same force and effect which the Georgia Supreme Court had declared in *Buchan v. Williamson* should be given on a judgment in proceedings to which all distributees were parties, but to which the personal representative was not a party. The Federal Constitution required no more than that Delaware should give this Georgia judgment the same effect that it would be given in Georgia, and this clearly was done.

Thomas v. Morrisett, 76 *Ga.* 384, cited by opposing counsel, is not in conflict with *Buchan, Admr. v. Williamson, supra.* In the earlier case the Supreme Court of Georgia expressly points out that there were no creditors of the decedent in Georgia, where the second administration was obtained. Also, that this second administration "was manifestly collusive, and for that reason it was void." See p. 389.

Furthermore, *Thomas v. Morrisett* was by a divided bench, at a time when the court consisted of only three Justices. Two of them concurred and one dissented. *Buchan v. Williamson* is a later case by a full bench of six Justices, concurred in by all members of the court.

It is provided by statute in Georgia that in effect a decision by a divided court yields in authority to a full bench decision by a unanimous court. See *Georgia Code* §6-1611.

As to the general rule that the representative of an estate is not concluded by a judgment in a case in which heirs and distributees only are parties, there appears to be no conflict in the decisions.

Since these principles are so well settled that they can no longer be questioned, and since admittedly the New York administrator c. t. a. was not a party to the Georgia proceedings, we come to the question of how the petitioners in this case seek to avoid the controlling force of the rules of law to which we have referred. They are asking that the New York administrator c. t. a. be held barred by a Georgia judgment in proceedings to which it was a total stranger. They go further than this. They claim that this strange result is required by the full faith and credit clause of the Federal Constitution. We, therefore, next examine the theory on which the petitioners seek to arrive at this result.

Petitioners' Theory on Which It Is Claimed New York Administrator C. T. A. Is Bound Is Unsound.

At this point of the discussion we are obviously at a turning point in the case, because unless there is some theory on which this case can be taken out of the controlling effect of the decisions heretofore cited, it is clear that the Delaware judgment is not only correct, but that any contrary judgment would have denied the New York administrator c. t. a. the due process of law guaranteed by the Fourteenth Amendment. (See: *Hansberry v. Lee*, 311 *U. S.* 32).

In many ways opposing counsel press the view that the Georgia judgment settled the succession to the decedent's estate and "was binding on all the world in any contest relating to the succession to the title to any personalty of the decedent." This position rests upon a confusion of thought at this point growing out of the fact that opposing counsel here fail to distinguish between the operation of a judgment in rem and a judgment in personam. A probate judgment is basically in rem, and with certain qualifications it is, within the jurisdiction rendering it, binding as fixing a status. This effect is attributed to it as a judgment in rem only. A judgment in personam, whether rendered in probate proceedings or otherwise, is not "binding on all the world". It is binding only on the parties and their privies. The distinction with respect to such judgments, and particularly with respect to probate judgments, is clearly pointed out in *Tilt v. Kelsey*, 207 *U. S.* 43. It has never been questioned. The suggestion that any judgment is binding in personam on "all the world" is simply contrary to all precedents, and, indeed, runs into constitutional difficulties, as pointed out in *Hansberry v. Lee, supra.* As a judgment in rem, the Georgia finding operates only in the State of Georgia, and on prop-

erty in Georgia. It may or may not be binding there on "all the world", but it certainly in not so binding with respect to property in Delaware. What opposing counsel are really doing here is taking a characteristic sometimes attributed to a judgment in rem in the state in which it is rendered, and seeking to apply it to a judgment as one in personam when asserted in another state.

Opposing counsel also press on the Court the decision in *Chicago, Rock Island & Pacific Ry. Co. v. Schendel,* 270 *U. S.* 611, and the cases following that decision.

The *Schendel* case announced the rule that "identity of parties is not a mere matter of form but of substance"; and also, that "parties nominally different may be in legal effect the same". With this proposition we have no quarrel; but the effort of petitioners to apply this doctrine to the present case is both contradicted by the facts in the record and unsound in point of law. The Schendel case, upon analysis, instead of supporting the position of opposing counsel in the case at bar shows its complete fallacy.

The administrator in the Schendel case was not suing for the benefit of the estate of the decedent but was suing to enforce a cause of action for homicide, the cause of action being given under the Federal Employers' Liability Act to the administrator as a special trustee for the benefit of the widow of the deceased. The question arose as to whether the administrator was bound by a judgment in a case brought by the widow under another statute under which she, as the beneficiary, could proceed in her own name. The court held that the administrator was so bound, but *based this holding solely on the ground that the administrator was not proceeding as a representative of the decendent's estate but as a special trustee for a particular cause of action.* A reading of this decision leaves no doubt that the court sus-

tained this bar solely because of the distinction we have noted. In effect the court points out that if the administrator had been proceeding as the general representative of the estate the former judgment could not have been pleaded in bar. The court says:

> *"Since the statutory authority of the administrator is to sue, not in his own right or for his own benefit or that of the estate, but in the right and for the sole benefit of the widow,* the same principles are applicable, in accordance with the general rule that 'whenever an action may properly be maintained or defended by a trustee in his representative capacity without joining the beneficiary, the latter is necessarily bound by the judgment.'" (Italics ours)

The state cases which have followed the Schendel decision, and which are pressed by opposing counsel, all make exactly the same distinction and use substantially the same language. Thus, for example, *Keith v. Willers Truck Service, Inc.*, 64 *S. D.* 274, 266 *N. W.* 256, 104 *A. L. R.* 1471, referring to cases holding administrator of an estate not bound by judgments against distributees, says:

> "These and other cases dealing with the tangible assets and debts of the estates of deceased persons present a different problem than cases involving causes of action given by a statute to a personal representative for the sole benefit of named beneficiaries. The recovery in an action for wrongful death is not for the benefit of the estate, but for the surviving spouse and next of kin."

Opposing counsel press next a dictum by Mr. Justice Pitney, speaking for this Court, in *Baker v. Baker, Eccles & Co.*, 242 *U. S.* 394. That dictum is entirely correct in the connection in which it is uttered. Opposing counsel, however, seek to apply it in a totally different connection and to draw from it a conclusion which, obviously, was never in-

tended. That case involved no quesion of the right to administer the property of a decedent, and involved no question of whether a personal representative of the decedent's estate was bound by a judgment against heirs and distributees. A Tennessee Chancery Court had rendered a decree with respect to who were the distributees of the estate. Thereafter, in a case in Kentucky (that being the case which came before this Court) it was sought to plead this Chancery judgment against a distributee who was not a party to the Chancery case. The Court held such a distributee was not bound. After reaching this conclusion Mr. Justice Pitney pointed out that it had been argued by counsel that there ought to be some way to bind all distributees where the distribution was determined by the question of domicile, and he correctly said that this could not be done unless a jurisdiction could be found in which all distributees could be made parties. It is a distortion of his statement to suggest that he meant anything more.

Now no one doubts that an individual may be bound by a plenary judgment in personam in a proceeding to which he is a party. (Whether he is so bound in any particuar case depends on the facts and circumstances of that case. There was in the case at bar no inquiry along this line, because distributees were not parties to the case at bar). It would, therefore, follow that if all distributees were made parties to a plenary suit in a court having jurisdiction it might be possible to bind all of them on the point of distribution. This, of course, is what Mr. Justice Pitney was saying. Equally, of course, an entirely different question arises when it is sought to bind an administrator of an estate by a judgment in a case to which he was not a party. The dictum in the Baker case is simply not in point on the facts of this case and gives no support to the position of opposing counsel.

Opposing counsel then advance what is, to us at least, a curious argument. They seem to recognize that substantial identity is necessary to establish the bar of a judgment in a subsequent case. By implication, though not expressly, they seem to recognize that there cannot be substantial identity in this respect between the New York administrator c. t. a. and the distributees, since the administrator c. t. a. would recover and administer the property also for the benefit of creditors and of the State of New York as a tax claimant. Then to avoid the effect of this obvious lack of identity they insist that it makes no difference, because neither the administrator c. t. a. nor creditors, nor tax claimants, had a right to be heard in the Georgia proceedings to probate the will; and since they had no right to be parties, they are, as counsel argue, bound by the judgment, even though they were not parties. To be sure we state counsel's position correctly at this point, we quote from their brief on page 16:

> "The Georgia judgment was binding upon the New York administrator in the contest in Delaware, involving succession to the title to assets of the estate, notwithstanding that the New York administrator was not a party to the Georgia proceedings and judgment, *because it was not entitled to be a party thereto,* and all persons interested in the question of the succession were parties." (Italics ours.)

Also:

> "***Neither the State of New York nor anyone else claiming as a creditor is affected by the finding of domicile in the Georgia proceedings."

(We shall point out a little later that the State of New York is affected by these Georgia proceedings, if they have the result counsel claims for them, to the extent that the possibility of New York collecting its taxes would be thereby destroyed).

Also:

> "A creditor or tax claimant is not entitled to be heard on the probate of a will, and hence after the succession has been determined cannot dispute the right or title of possession of the personal representative whose title has been established in the probate proceedings."

We fully agree with counsel that neither a creditor nor tax claimant, nor the New York administrator c. t. a., could have asserted the right to be heard in these Georgia probate proceedings; and being in accord on that point, we do not discuss it further.[3] The position of opposing counsel, however, that since none of these parties could appear in the Georgia proceedings, they would nevertheless be bound by the judgment there rendered as a judgment in personam, even though neither they nor their privies were or could be parties, is a conclusion that can in no possible way be sustained. Indeed, the fact that they could not in any way have appeared in such a proceeding is a conclusive reason for saying that they cannot be bound by the judgment as one in personam. The effect of such proceedings inside the State of Georgia as a judgment in rem, determining the status of the decedent's estate there, is, of course, a different matter.[4] What opposing counsel are attempting to do is to assert

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[3]See: 1 Page on Wills, 2d Ed., p. 931; Ann. L. R. A. 1918A, p. 456; Hooks v. Brown, 125 Ga. 122 (5), 53 S. E. 583.

[4]See in this connection the clear statement of this Court in Tilt v. Kelsey, 207 U. S. 43, quoting at length from Mr. Justice Holmes' opinion in Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265. This Court holds: A judgment in rem *within the jurisdiction rendering the judgment*, is "conclusive on all the world in what we may call its legislative effect," but that "as strangers in interest are not entitled to be heard there is no reason why they should be bound by findings of fact." The application made with reference to a judgment of the New Jersey probate court was that "the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicile."

this judgment as a bar in personam. Their position, bluntly stated, is that one may be bound by a judgment in personam in a case to which he was not a party, provided it is made to appear that he was not legally entitled to be heard in the case. The non sequitur is, of course, obvious.

Another group of cases on which opposing counsel rely are the recent cases in which this Court has held that a party to a case may be estopped in a later case to question the jurisdiction of the court in the first case, if such party has in fact raised this issue as to jurisdiction and had it determined against him. They are: *Davis v. Davis,* 305 *U. S.* 32; *Sovereign Camp Woodmen of the World v. Bolin,* 305 *U. S.* 66; and *Stoll v. Gottlieb,* 305 *U. S.* 165. We point out later in this brief in another connection, that this Court, as late as the decision in *United States v. United States Fidelity & Guaranty Co.,* 309 *U. S.* 506, has indicated that its late decisions on the question of collateral attack on judgments are not to be understood as abandoning the distinction asserted in many decisions between strictly jurisdictional and merely quasi jurisdictional facts. It is necessary here to note only that the cases here pressed by opposing counsel are in no way applicable to the point immediately under discussion. They relate solely to how far a party to a case is bound by a judgment in that case as to the jurisdiction of the court when the question arises in later litigation. The question we are here dealing with is whether the judgment of the Georgia court is binding at all or in any respect, or in any particular, on one who was not a party to that case or in privity with a party, which is simply a different question.

Another case along a somewhat different line, pressed by opposing counsel, is the decision of the Circuit Court of Appeals of the Fifth Circuit in *Roberts v. Bathurst,* 112 *F.* (2*d*)

543. That case turned on the equitable doctrine of avoiding circuity of action. The court in its opinion puts its ruling finally on this equitable doctrine alone. The contest was between a Florida executrix and a Massachusetts administrator over the proceeds of a life insurance policy payable to the estate of the deceased. But it also appeared that the Florida executrix was the sole beneficiary entitled to the proceeds of the policy, no matter which representative might receive the money. The court finds it necessary to emphasize the fact that it affirmatively appeared that there were no debts of the decedent, saying: *"There are no debts to be paid."* In this situation, and solely "to avoid circuity of action" the court of appeals ordered the Florida executrix to collect the policy. It is perfectly clear from the opinion that a different result would have been reached had it not appeared that there were no debts of the estate. Hence, the necessary inference from the case, as applied to the case at bar, where there are both debts and tax claimants, is that the decision does not support the position of opposing counsel. Moreover, in that case, the court was not limited, as it is here, to a determination of the question as to whether the full faith and credit clause of the Federal Constitution was violated by the judgment being reviewed. The Delaware judgment, in the case at bar, is not subject to be reviewed by this Court in respect to the general equitable principles adopted by the court in the judgment.

Had petitioners wished to invoke the doctrine of avoiding circuity of action in any form at all appropriate to this case, it would have been necessary for them to have filed entirely different pleadings from those in the record. They have pleaded the Georgia judgment as a complete bar, and have not asked that it be considered from any other standpoint. Where it affirmatively appears that there are both creditors and tax claimants, then neither the principle of

avoiding circuity of action, nor any other rule of law can be invoked to make this judgment a complete bar. This being the only issue raised in the pleadings, it was not necessary for the court to consider anything else, nor did the court rule on anything further.

Also it is unnecessary to consider whether it would be possible to plead a judgment as a partial bar, where no substantial identity of parties is shown. There is certainly no precedent for anything of the kind, and there is no need to speculate about such a possibility in a case where it was not attempted. Futhermore, the whole question involved in *Roberts v. Bathurst, supra,* was the equitable doctrine of avoiding circuity of action. This is in no sense a principle of Federal constitutional law. The Federal courts are free to apply the doctrine in cases before them, as they may determine; but state courts have equal freedom.

There Is No "Substantial Identity" Between the Administrator C. T. A. and the Distributees.

We here restate the relevancy of the above statement, namely: There is no doubt about the proposition that the Georgia judgment as a judgment in rem does not bind property in Delaware, and as a judgment in personam binds only parties and their privies. There is also no doubt about the proposition that an administrator generally is not in privity with distributees, and hence is not bound by a judgment in personam against them. Petitioners seek to avoid the effect of these principles by asserting a theory of substantial identity—that is to say—they assert that the administrator c. t. a. represents the identical interests represented by the distributees. We have heretofore discussed decisions bearing on this contention. We now point out that under the facts of the present record no theory of substantial identity is appli-

cable. The reason for this is very simple, namely: The administrator c. t. a. does not represent merely the same interests as the distributees. On the contrary there are creditors of the estate, some of them in New York, and there are tax claims of the State of New York, all of which must be enforced through the administration of the estate.

This case arose on an interpleader, as heretofore stated. Each claimant of the stock was required to set out the basis of its claim. The administrator c. t. a. set out, among other things, "there are creditors of said estate residing and domiciled in the State of New York, who are interested in the proper and lawful administration of said estate." (R. 61). Again, by amendment, the administrator c. t. a. showed that "all creditors of the decedent, some of whom are residents of the State of New York, were interested in said estate." (R. 118). No issue was made on these averments and no proof was offered negating the general presumption that there are creditors of the estate. Actually, the controlling ruling with respect to the operation and effect of the Georgia judgment as a bar was invoked by a motion based on the pleading. See the decision of the late Chancellor Wolcott, commencing at page 134 in the record.

Hence the effort of the petitioners to show that there is substantial identity breaks down at the start, because there is no showing that there are no creditors of the estate.

As to the tax claims of the State of New York the showing is very emphatic. *The administrator c. t. a. was appointed primarily on the application of the New York Tax Commission as a necessary step in the collection of its tax claims.* There had been the appointment of a temporary administrator on the application of Hungerford, the husband of the deceased, but no application to probate the will in New York and no application for permanent administration there

had been made when, on June 12, 1936, the New York Tax Commission filed in the Surrogate's Court of New York County its application to probate this will, and for the appointment of an administrator c. t. a. (R. 76). The application points out that Mrs. Hungerford was domiciled in New York County, State of New York, at the time of her death; that she left an estate of over $500,000; that the Tax Commission is proceeding because of its duty to "enforce the payment of estate's taxes due the State of New York on the transfer of property of the deceased."

On the filing of this petition the Surrogate's Court made appropriate orders for the service on non-residents. (R. 82, and following).

Later, on October 15, 1937, Hungerford also filed a petition for probate of the will and appointment of an administrator c. t. a. On February 14, 1938, the Surrogate passed an order (R. 124) reciting the whole proceedings in the matter; reciting that the application of the State Tax Commission had been delayed by a restraining order issued by the District Court of the United States for the Southern District of Georgia, but that this restraining order had been discharged, and ordering that the proceedings filed by the State Tax Commission, and the proceedings filed by Hungerford, be consolidated.

The Surrogate's Court then passed an order (R. 126) adjudging that the deceased was domiciled in New York at the time of her death; ordering the probate of the will; and appointing the New York Trust Company as administrator c. t. a.

New York Has the Sovereign Right to Control the Administration of the Estate of One Who Died Domiciled in New York, And Through That Administration to Collect Its Just Taxes. No Action by the Georgia Courts Could Bar This Right or Foreclose the State of New York on the Fact of Domicile.

In its opinion in this case the Supreme Court of Delaware declared:

> "The appellant, however, is far more than being the representative of a mere creditor or tax claimant. Any claim that the State of New York may have for inheritance taxes or other taxes is not the basis of its right to be heard on the question of domicile. That right proceeds from the fact that the decedent was its domiciled citizen at the time of her death; and the appellant, appointed by the authority of its proper court, is its arm to gather together, in so far as is permited by law, the personal property of the deceased, and to administer and distribute the property according to her will and the laws of the State. Being the seat of domiciliary administration, it is not compelled to press its claim for taxes in a jurisdiction of ancillary administration." (R. 231).

It is difficult to see how there could be any real argument over this proposition of constitutional law; nor how there can be any doubt that this necessarily requires an affirmance of this judgment.

The Delaware Supreme Court has found, as a matter of fact, that the deceased was domiciled in the State of New York. The State of New York has sought and obtained administration in its Surrogate's Court on the estate of its deceased citizen, and has asserted its right to estate taxes.

The proposition of petitioner herein, however, is that certain proceedings in the courts of the State of Georgia, to

which of course, the State of New York was not and could not have been made a party, have the effect of barring the State of New York from thus administering the estate of its deceased citizen, and thus collecting through this administration, its just taxes. It is obvious that the State of Georgia, neither through its courts, nor in any other way, could create such a bar against the State of New York, nor could any proceedings in the State of Georgia have the effect of estopping the State of New York from asserting the true facts with respect to domicile, and on the basis of such facts, proceeding to collect its taxes.

It is, of course, one of the most familiar principles of our constitutional system that within their respective spheres each state is sovereign.[5]

Also, as this court said in *Wilkins v. Ellett*, 108 *U. S.* 256:

> "There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicile at the time of his death, that the proper place for the principal administration of his estate is that domicile."

Statements to the same general effect have been made many times by the courts and by writers on legal subjects. It would be difficult to find any conflict in the authorities. Merely as illustrations of the universal recognition of the rule the following are quoted:

> "The general rule is that a decedent's domicile at the time of his death is the proper jurisdiction in which to obtain letters testamentary or of administration, irrespective of whether death occurred there or elsewhere." 21 *Am. Jur.* 398.

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[5]State of N. H. v. State of La., 108 U. S. 76; Collector v. Day, 11 Wall. 113; Abelman v. Booth, 21 How. 506; State of R. I. v. Commonwealth of Mass., 12 Pet. 657; Mayor, Alderman and Commonalty of City of N. Y. v. Miln, 11 Pet. 102; Buckner v. Finley, 2 Pet. 586.

> "It is a general rule that a decedent's domicil at the time of his death is the proper jurisdiction in which to obtain letters testamentary or of administration, and ordinarily it is the place of primary and exclusive jurisdiction in the settlement of his estate." 11 *R. C. L.* 69.

A large number of state cases could be cited. As illustrations, a few are noted in the footnote.[6]

The decision of the Supreme Court of Delaware correctly recognized that the State of the decedent's domicile not only had legal power to administer the personal estate of its deceased citizen but also could not be deprived of this right or estopped on the fact of domicile by proceedings in the courts of another sovereignty. Had the Supreme Court of Delaware rendered any other decision it would have departed from fundamental ideas which have long governed the relation of states to each other.

New York Could Not Collect Its Estate Taxes Through the Georgia Courts.

Opposing counsel argue that the State of New York is not "affected by the finding of domicile in the Georgia proceedings." If by this is meant that that finding is not binding on the State of New York, we would agree fully with the statement, and would proceed from there to the next step, namely, that the State of New York, therefore, had the right to do what it in fact did do in this case, namely, proceed to obtain administration in that state on the estate of its deceased citizen, for the purpose, among other things, of

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[6]McCully v. Cooper, 114 Calif. 258, 46 Pac. 82; Rackemann v. Taylor, 204 Mass. 394, 90 N. E. 552; Brafman v. Brafman, 144 Md. 413, 125 Atl. 161; McEwen v. McEwen, 50 N. D. 662, 197 N. W. 862.

collecting its just taxes. If opposing counsel mean by "affected" (as we think they do) that the State of New York would not have been injured had the Georgia determination been held binding in Delaware, then the statement is unsound, because the actual effect would be to deprive the State of New York of the possibility of collecting its tax claims.

We refer here not to the practical difficulty the New York authorities would face when going into the State of Georgia to assert a claim to estate taxes. The practical difficulty is, of course, obvious, since the asserted right of New York to estate taxes is that the decedent was domiciled in New York, whereas the claim of the State of Georgia to estate taxes, and indeed the whole basis of the administration in the Georgia Court of Ordinary is on a directly contrary claim, namely, that the decedent was domiciled in Georgia. In addition to this practical difficulty, however, there is a complete legal bar which would prevent the State of New York from proceeding in the Georgia courts.

By an act approved January 3, 1938 (*Ga. Laws, Extra-Session* 1937-1938, *p.* 102) the State of Georgia provides:

> "The courts of this state shall recognize and enforce liabilities for taxation lawfully imposed by other states which extend like comity."

Hence the question of whether New York could assert its tax claims in the Court of Ordinary of Fulton County, Georgia, or in any other court in that state, depends, under this Georgia legislation, on whether New York extends like comity to other states. It seems to be definitely settled in New York that it does not extend such comity to other states. A clear statement of the rule in New York is found in, *In re Martin's Estate*, 136 *Misc.* 51, 240 *N. Y. S.* 393; affirmed

255 *N. Y.* 359, 174 *N. E.* 753. The Surrogate's Court in New York was administering the estate of one Martin, in which administration the State of Connecticut sought to appear "for the purpose of compelling executors to pay a transfer tax claimed to be due that state." The question therefore involved was whether one state could appear in the New York court having charge of the administration of the decedent's estate and there assert its claims for taxes. This is exactly what the State of New York would be compelled to do if it sought to collect in Georgia the tax claims asserted by New York.

Under the statute we have quoted, the controlling question in Georgia would be whether New York permitted such procedure. If not, then Georgia would not permit New York's tax claims to be thus asserted.

In the *Martin case,* the court first refers to *Colorado v. Harbeck,* 232 *N. Y.* 71, 133 *N. E.* 357, and to the *Matter of Bliss' Estate,* 121 *Misc.* 773, 202 *N. Y. S.* 185, as holding: "Our courts cannot be employed in aid of the collection of foreign taxes." The court then inquires whether a statute in New York known as the reciprocity statute had changed this situation, and reaches the conclusion that provisions of that statute related to reciprocity in other respects, but not reciprocity in the matter now under consideration. We quote as follows:

> "Connecticut claims, however, that the public policy of New York and the law of the Harbeck and Bliss cases have been fundamentally changed by the adoption of the reciprocal provision in our Tax Law (section 248-p). That statute was enacted by our Legislature in 1925. (Laws 1925, c. 143), and in the same year Connecticut adopted a similar statutory provision (Pub. Act Conn. 1925, c. 239). The purpose of this reciprocity legislation is laudable. It prevents, as be-

tween the co-operating states, the imposition of multiple taxes and avoids the necessity of conducting, in the estate of a New York resident, transfer tax proceedings in states having reciprocal statutes. It appears that 39 different jurisdictions, including many states of the Union, are within the reciprocal group. Multiple taxation has been abolished, and the need of reciprocal legislation has now been avoided by the sweeping decision of the United States Supreme Court, rendered January 6, 1930, in the case of Farmers' Loan & Trust Co. v. State of Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. ed.—. That decision specifically overruled Blackstone v. Miller, 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439, and held that the transfer of property (other than tangible personal property and real property) cannot be taxed by a state against the estate of a nonresident. In other words, the succession to or transfer of intangible personal property, regardless of its actual situs, can now only be taxed validly in the state of domicile. But, in my opinion, the enactment of the reciprocal provision of our Tax Law did not change the rule of public policy laid down in the Harbeck case, that our courts cannot be used for the collection of foreign taxes."

See also: *Matter of Spitzer*, 170 *Misc.* 161, 9 *N. Y. S.* (2*d*) 868 (1939); *Estate of Mary Donovan, N. Y. L. J., June* 18, 1941, *p.* 2739, in which Surrogate Foley said:

"The courts of this State are not concerned with the collection of inheritance taxes levied by foreign governments or other states."

It thus seems clear that New York would not be permitted a hearing in the Georgia courts on this asserted tax liability. Hence, unless the present case is affirmed, this startling situation will result: A citizen of New York dies, but because of proceedings in Georgia courts the State of New York is barred from maintaining administration in that State on the securities of the deceased, and is required to

permit the State of Georgia to administer all of these securities, notwithstanding the fact that the State of New York would not have access to the Georgia courts even to assert its tax claims.

The Federal Constitution Does Not Forestall Conflicting Decisions of Domicile by Different States. Nor Does It Forestall Action by Each State With Reference to the Decedent's Estate, Consistent With Its Determination of Domicile.

This court gave a clear expression to the above principle in *Worcester County Trust Co. v. Riley,* 302 *U. S.* 292. The case involved a determination of whether the Federal Interpleader Act could, consistently with the Eleventh Amendment, be made the basis of a suit against tax officials in two different states, in each of which it was claimed the decedent had been domiciled. Each state was proceeding to collect taxes on the theory that the decedent was domiciled there. It was claimed that the decedent could not have been domiciled in two states and that as the Federal Constitution prohibited the taxation of the decedent's estate in the manner sought in a state in which the decedent was not domiciled, therefore, it was contended the bill could be sustained; to which this Court replied:

> "Petitioner's contention is that here the prospective official action of respondents involves a threatened violation of the Constitution for which state law can afford no sanction. It is said that as the officers of each state assert the right to collect the tax out of decedent's property within the state, they may succeed in establishing that right by a judicial determination in each that decedent was last domiciled there, cf. Dorrance's Estate, 309 Pa. 151, 163 A. 303; In re Estate of Dorrance, 115 N. J. Eq. 268, 170 A. 601; Id., 116 N. J.

Eq. 204, 172 A. 503, with New Jersey v. Pennsylvania, 287 U. S. 580, 53 S. Ct. 313, 77 L. Ed. 508; Dorrance v. Pennsylvania, 287 U. S. 660, 53 S. Ct. 222, 77 L. Ed. 570; Hill v. Martin, 296 U. S. 393, 56 S. Ct. 278, 80 L. Ed. 293, although he could not be domiciled in both; that neither state could constitutionally authorize its officials to impose the tax if decedent was last domiciled elsewhere, and petitioner is thus exposed to the danger of double taxation, which the Constitution forbids. See First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313, 77 A. L. R. 1401; Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000. As those officials threaten acts whose consequences may be taxation which is unauthorized by any valid state enactment, petitioner insists that the suit brought to restrain such action does not run against the state.

"But this argument confuses *the possibility of conflict of decisions of the courts of the two states, which the Constitution does not forestall*, with other types of action by state officers," etc. (Italics ours.)

There is obviously no difference between the power and right of a state to institute tax proceedings against the estate of one who it is claimed was domiciled there, on the one hand, and on the other, proceedings by a state to administer the estate of one who the State authorities claim was its domiciled citizen. *Worcester County Trust Co. v. Riley, supra,* seems to settle definitely—if, indeed, it needed to be settled—that nothing in the Federal Constitution prevents two states making conflicting findings of domicile and proceeding accordingly. This is what actually happened here. The appointment of the administrator c. t. a. in New York was invoked by the tax authorities of the State of New York as the first step, and a necessary step, in the assertion of the tax claims of that state.

Delaware Supreme Court Was Bound to Give to Georgia Judgment Only Such "Faith and Credit" as It Would "Have By Law or Usage in the Courts" of Georgia. Petitioners' Failure to Prove the Georgia "Law or Usage" Prevents Their Claiming Proper "Faith and Credit" Was Denied to This Judgment.

The Fourth Article of the Federal Constitution provides that each state shall give full faith and credit to the judgments of other states, and that Congress has the authority to determine the manner of proving such judgments "and the effects thereof."

Pursuant to this provision the Act of May 22, 1790 (1 *Stat.* 122), now *Sec.* 687 *of Title* 28 *U. S. C.*, provided that such judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The decisions stating this rule are familiar and numerous; it is unnecesary to quote them here. They will be found collected in the notes to the above code section in U. S. C. A.

Therefore, the effect which the Delaware Supreme Court was required to give to this Georgia judgment was such effect as it would have "by law or usage in the courts" of the State of Georgia. Now the effect which petitioners seek to have given to this judgment is one that is not apparent on the face of the judgment. Where a judgment for the recovery of money is sued on in another state it would not ordinarily be necessary to prove that under the law of the State in which the judgment was rendered a judgment for the recovery of money has the effect of allowing a recovery of money. This is apparent on the face of the judgment

itself. Here, however, the judgment for which full faith and credit is claimed is sought to be used in a way that is not definitely settled by the face of the judgment itself. The face of the judgment does not purport to bind the administrator c. t. a. and petitioners assert that it ought to be treated as having the effect of binding the administrator c.t.a. Furthermore, the Supreme Court of Delaware found a fact, namely, the New York domicile of the decedent, which requires the conclusion that the Georgia court did not have jurisdiction of the subject matter on which it acted, namely, the establishment of a domiciliary administration of the decedent's estate.

The problems that arise under the Georgia law as to the effect to be given this judgment are these: Does a judgment against the distributees of an estate have the effect of binding the personal representative of the estate? Is the doctrine of substantial identity of parties with respect to the rule of res adjudicata recognized in the State of Georgia? If so, is there substantial identity between the distributees and the representative of the estate, where it also appears that there are creditors and tax claimants? May a judgment be collaterally attacked for lack of jurisdiction of the subject matter on which the court acted? All of these are questions of Georgia law which must be known before it can be determined whether the Georgia courts would give to this judgment the effect which is demanded for it by petitioners herein, and the Georgia law with respect to all of these matters must be known before the court could determine that the Delaware court had or had not denied to this Georgia judgment the full effect to which it was entitled under the constitution and laws of the United States.

The record in this case is perfectly silent as to what the Georgia law is on these points. Nothing was alleged as to it, and no proof was offered.

In *Lloyd v. Matthews,* 155 *U. S.* 222, this Court pointed out that in reviewing the judgment of a State court it could not take judicial cognizance of the laws of another state. We quote from that decision:

> "* * * The courts of the United States when exercising their original jurisdiction take notice, without proof, of the laws of the several states, but in the Supreme Court of the United States, when acting under its appellate jurisdiction, whatever was matter of fact in the state court whose judgment or decree is under review is matter of fact here. And whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact. * * *
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> "The court of appeals was obliged to determine the case on the record, and plaintiff in error had failed to plead the construction given the Ohio statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the State of Ohio, or to prove the common law of that state by the parol evidence of persons learned in that law, or to put in evidence the laws of that state as printed under the authority thereof, or a certified copy thereof, as provided by the law of Kentucky. * * *
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> "This record contains nothing to show, as matter of fact, that the public acts of Ohio had by law or usage in Ohio any other effect than was given them by the court of appeals of Kentucky."

See also:

Hanley v. Donoghue, 116 *U. S.* 1;
Renaud v. Abbott, 116 *U. S.* 277;
Chicago, etc. RR. Co. v. Wiggins Ferry Co., 119 *U. S.* 615;
Adam v. Saenger, 303 *U. S.* 59.

It necessarily follows, therefore, that one who asserts that a judgment has been denied full force and effect must produce to the court in which the judgment is sought to be asserted adequate proof of the relevant legal rules of the State in which the judgment was rendered, and if he does not do so, his contention must fail. This has been specifically declared by this Court.

In *Gasquet v. Lapeyre*, 242 *U. S.* 367, this Court says:

> "There are several reasons why this assignment affords no basis for a review here, but the statement of one will suffice. What the Constitution and the congressional enactment require is that a judgment of a court of one state, if founded upon adequate jurisdiction of the parties and subject matter, shall be given the same faith and credit in a court of another state that it has by law or usage in the courts of the state of its rendition. This presupposes that the law or usage in the latter state will be brought to the attention of the court in the other state by appropriate allegation and proof, or in some other recognized mode; for the courts of one state are not presumed to know, and therefore not bound to take judicial notice of, the laws or usage of another state. Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; Chicago and A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 275, 50 L. ed. 220, 225, 35 Sup. Ct. Rep. 37. Here the law or usage in Tennessee, where the judgment was rendered, was not in any way brought to the attention of the Louisiana court, and therefore an essential step in invoking the full faith and credit clause was omitted. In this situation the claim that the Louisiana court refused to give effect to that clause is so devoid of merit as to be frivolous."

Delaware courts will not take cognizance of the law of another state.

Nye Odorless Incinerator Corp. v. Felton, 5 *W. W. Harr.* 236, 162 *Atl.* 506.

With reference to the question of whether under the Georgia law a judgment against distributees can be pleaded in bar against the representative of the estate, we have already pointed out in discussing this as a general rather than as a local question of law, that Georgia appears definitely in line with the uniform rule that a judgment cannot be so pleaded. See *Buchan, Admrx. v. Williamson*, 142 *Ga.* 198, 82 *S. E.* 548.

We shall not at this point undertake a presentation of the Georgia law as to whether a judgment can be collaterally attacked because of fundamental lack of jurisdiction of the court over the subject matter with respect to which it purports to act. If at the argument it should develop that the Court felt it possible, notwithstanding the cases heretofore cited, to take judicial cognizance of the Georgia law on this point, we would ask permission to file a supplemental brief. We believe that it can be pointed out that the Georgia statutes draw a distinction in this respect between a fundamental lack of jurisdiction of the subject matter, which renders the judgment absolutely void and subject to collateral attack, on the one hand, and on the other, those quasi jurisdictional matters which are regarded as only irregularities. We believe that we could also point out that while it may not be possible to reconcile all the dicta in the Georgia cases, the actual decisions are in accord with this distinction, and

the position here stated is squarely sustained by the late Georgia cases.[7]

The limitations on the extent to which the Court will in this case take judicial cognizance of the Georgia law merely brings us back, however, to the proposition that here was a burden definitely resting on petitioners, who asserted that the Georgia judgment had not been given full faith and credit. Petitioners failed to bear this burden.

The subject matter here, if the Georgia judgment is given the effect sought by opposing counsel, is the domiciliary administration of the decedent's estate—that is to say—the res on which the court attempted to act was the entire estate. That subject matter is dependent on domicile. Any court attempting to establish a domiciliary administration in a state other than the decedent's domicile is as fully dealing with a subject matter beyond the jurisdiction of the court as

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[7] *Ga. Code, Sec.* 110-709:

"Judgments void because of want of jurisdiction of court.—The judgment of a court having no jurisdiction of the person or subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it."

Ga. Code, Sec. 110-708, deals with irregularities—that is, in effect, with quasi jurisdictional matters, as follows:

"The judgment of a court of competent jurisdiction may not be collaterally attacked in any other court for irregularity, but shall be taken and held as a valid judgment until it is reversed or set aside."

Ga. Code, Sec. 110-701:

"How attacked. A void judgment may be attacked in any court and by any person. In all other cases judgments may not be impeached collaterally, but must be set aside by the court rendering them."

See: Elliott v. Elliott, 181 Ga. 545, 182 S. E. 845 (effort to enforce foreign judgment where jurisdiction of subject matter absent); Allen v. Baker, 188 Ga. 696, 4 S. E. (2d) 642; Montgomery v. Suttles, 191 Ga. 781, 13 S. E. (2d) 781; Durden v. Durden, 191 Ga. 404, 12 S. E. (2d) 305.

a prize court would be if it attempted to dispose of a ship which had not been taken.

With reference to a similar situation, in *Overby v. Gordon*, 177 *U. S.* 214, this Court, speaking of the effort of the Georgia Court of Ordinary to create a domiciliary administration, said:

> "The subject matter or res, upon which the power of the court was to be exercised was therefore the estate of the decedent."

Further the Court said:

> "The sovereignty of the State of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the State."

In the case at bar there was in the Georgia courts no contest on the point of domicile. The only contest raised by Hungerford there was that according to his construction of the proceedings they were merely to probate a will (there being real estate in Fulton County, Georgia) and that it was no part of the case to consider the establishment of the domiciliary administration. This was at least not a frivolous contention, since the Chief Justice of Georgia thought the position well founded. See dissenting opinion of Russell, C. J. (R. 109). The majority of the court, however, sustained the proceeding as one to establish a domiciliary administration. (R. 108). The power of the Georgia court to do this depended on domicile. In the absence of domicile it was wholly without jurisdiction of the subject matter. Whether its judgment, lacking such fundamental jurisdiction of the subject matter, could be collaterally attacked is governed by the laws of the State of Georgia, which again brings us back to the unsustained burden placed upon the petitioners.

Petitioners cite certain cases of this Court which they claim have the effect of establishing a rule of res adjudicata to the effect that persons who are parties to a case cannot collaterally attack the judgment rendered, even if it appears that there is a fundamental lack of jurisdiction of the subject matter. We have heretofore pointed out that those cases have no bearing where the attempt is to plead the judgment against one not a party to the case in which it was rendered or in privity with a party. We now point out that for the reason above stated, where the question arises under the full faith and credit provision, the question is not what view of the law of res adjudicata this Court would take with respect to the federal courts, but on the contrary is what is the law of the state in which the judgment was rendered.

It is well, however, to point out also that the late cases from this Court, to which opposing counsel refer, do not establish any such principle of res adjudicata for the federal courts as is claimed by opposing counsel. The distinction between a fundamental lack of jurisdiction of the subject matter on the one hand and merely quasi jurisdictional facts on the other, is stated in many cases and by many law writers. No clearer statement has ever been made, however, than the statement of this Court in *Noble v. Union River Logging R. Co.*, 147 *U. S.* 165, from which we quote:

> "It is true that in every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common-law action, (D'Arcy v. Ketchum, 11 How, 165; Webster v. Reid, Id. 437; Harris v. Hardeman, 14 How. 334; Pennoyer v. Neff, 95 U. S. 714; Borden v.

Fitch, 15 Johns. 141;) the seizure and possession of the res within the bailiwick in a proceeding in rem, (Rose v. Himely, 4 Cranch, 241; Thompson v. Whitman, 18 Wall. 457;) a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged, (Galpin v. Page, 18 Wall 350; Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. Rep. 512.) So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, (Griffith v. Frazier, 8 Cranch. 9) or condemns as lawful prize a vessel that was never captured, (Rose v. Himely, 4 Cranch, 241, 269,) or a court-martial proceeds and sentences a person not in the military or naval service, (Wise v. Withers, 3 Cranch, 331,) or the land department issues a patent for land which has already been reserved or granted to another person—the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

"There is, however, another class of facts which are termed 'quasi jurisdictional,' which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged, and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally, (Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. Rep. 217; In re Sawyer, 124 U. S. 200, 220, 8 Sup. Ct. Rep. 482); the existence and amount of

the debt of a petitioning debtor in an involuntary bankruptcy, (Michaels v. Post, 21 Wall. 398; Betts v. Bagley, 12 Pick. 572;) the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate, (Comstock v. Crawford, 3 Wall. 396; Grignon's Lessee v. Astor, 2 How. 319; Florentine v. Barton, 2 Wall. 210;) the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors, (Thompson v. Tolmie, 2 Pet. 157;) and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are: Hudson v. Guestier, 6 Cranch, 281; Ex parte Watkins, 3 Pet. 193; U. S. v. Arredondo, 6 Pet. 691, 709; Dyckman v. City of New York, 5 N. Y. 434; Jackson v. Crawfords, 12 Wend. 533; Jackson v. Robinson, 4 Wend. 436; Fisher v. Bassett, 9 Leigh, 119, 131; Wright v. Douglas, 10 Barb. 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding; and, even if the court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose. Simms v. Slacum, 3 Cranch, 300."

In one of its latest decisions this Court has declared that it is not to be understood as departing from this rule. In *United States v. U. S. Fidelity & Guaranty Co.*, 309 *U. S.* 506, counsel had evidently pressed upon the Court the contention that *Chicot County Drainage District v. Baxter State Bank*, 308 *U. S.* 371, had in effect overriden the doctrine of the *Noble* case. This court expressly disclaims any such intention. It says:

"In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts."

In the margin the Court cites, on the difference between "strictly jurisdictional and quasi jurisdictional facts," the *Noble* case, to which we have referred. On the subject of judgments relating to status, the Court cites in the margin, *Andrews v. Andrews,* 188 *U. S.* 14. On the subject of extra-territorial actions of courts, the Court cites in the margin, *Fall v. Eastin,* 215 *U. S.* 1.

The question, however, is one of state law.

Should it be claimed, on the distribution of any surplus from the securities here involved, after paying debts and taxes, that the distributees are bound by this Georgia judgment, all of these matters would no doubt be inquired into by the Surrogate's Court in New York. No decision was made with respect to them by the Supreme Court of Delaware, and no decision should have been made. The court properly refrained from intimating any opinion on such points.

Domicile Being a Mixed Question of Law and of Fact, Georgia Judgment Determining Domicile Under Georgia Law Not Conclusive As to Domicile Under Delaware Law. Delaware Properly Applied Its Own Law.

Nothing is better settled in the law of domicile than that it is a mixed question of law and fact.[8] From this it inevitably results, as stated in *Beale on Conflict of Laws, Vol.* 1, *p.* 105, that:

> "* * * The determination of domicile after all involves questions of law, and the law determining domicile may conceivably differ in several states. In such a case, each court in which the case arises must, of course, apply its own law, not the differing law of some other state."

Again, the same author says, *p.* 94:

> "It must always be remembered that the law of domicile of two states may vary and therefore that the courts of two states may reach different conclusions as to the domicile of a single individual. There is no super-law which can prevent such a result."

When the Georgia court determined the question of domicile under its laws, it therefore passed on a mixed question involving two elements, (1) the Georgia law, and (2) the facts. Similarly, the Delaware court in passing on the question of domicile under the Delaware law, passed upon a question involving two elements, (1) the Delaware law, and (2) the facts. There was no identity

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[8]For example, see Commonwealth of Pennsylvania v. Ravenel, 21 How. 103; Sweeney v. District of Columbia, 113 F. (2d) 25; and cases collected in 19 C. J., p. 441, Note 95.

between the two questions because of the variance in one of the elements.

This Court has recently given an emphatic statement to the effect that findings as to domicile may vary in different states, and that nothing in the full faith and credit clause of the Federal Constitution requires uniformity. It could not so require uniformity because to do so would require all of the states to follow the same law of domicile, whereas, necessarily, each state has entire freedom as to what rules of law with respect to domicile it will follow. Thus in *Worcester County Trust Co. v. Riley,* 302 *U. S.* 292, this Court said:

> "Neither the Fourteenth Amendment nor the full faith and credit clause of the Federal Constitution requires uniformity in the decisions of the courts of different states on questions of domicile, where the exertion of state power is dependent upon domicile within its boundaries."

In *Texas v. Florida,* 306 *U. S.* 398, this Court entertained an original bill to require several states to be bound by one determination of domicile. It should be noted however, that in order to do this the Court found it necessary to determine that the law of domicile was the same in each of those states. We quote from page 413:

> "In considering and weighing the evidence the Special Master concluded that there was no local law peculiar to any of the states with respect to the essential fact elements which go to establish domicile, and that the rule in each of the states defining domicil was substantially that of the common law."

It is a clear inference from this statement that had it not affirmatively appeared to the Court that the law of domicile was the same in each of those states the Court would not have found it possible to make a determination

of domicile binding in each state.

In the present case the Delaware court construed the controlling Delaware statute as meaning that assets of a decedent found in Delaware should be sent to the domiciliary representative. (R. 229.) That construction of the statute is as much a part of the statute as if the decision were written into the act itself. *Burns Mortgage Co. v. Fried*, 292 *U. S.* 487. There can, we believe, be no question but that the domicile intended by this Delaware statute is domicile according to the laws of Delaware and not according to the laws of some other state. To hold that the Delaware court was bound by the Georgia finding of domicile would mean that the Delaware court, in applying the Delaware statute under which domicile was a controlling factor, was bound by the Georgia law of domicile rather than by the Delaware law on that subject.

We know from this record what principles of law with respect to domicile, as applied to the facts in the present record, are treated by the Delaware court as the law of Delaware. We know this because the court discusses these principles fully in its decision. It makes no difference whatever that in many instances the court cites and relies on authorities from other jurisdictions. Finally, the rules applied by the Delaware court are accepted as the law of Delaware and applied as such. Some of the legal principles thus applied as the law of Delaware are of great importance in controlling the final conclusion reached. This Court does not know from this record, and has no way of knowing, whether these rules of law for determining domicile would be recognized and followed in Georgia or not. The only thing in the record is the decision of the Georgia court. (R. 108.) That decision makes no statement of the Georgia law. None was called for since there had been

no contest in the trial court on the point of domicile, Hungerford's contention having been that the point was not before the court for consideration.

With a total absence of proof as to what rules of law were in force in Georgia for determining domicile, the Delaware court was not obliged to take cognizance of the Georgia law in this respect, and for reasons heretofore pointed out this Court cannot take such cognizance. We have also pointed out heretofore that wherever the law of a state is material to one asserting that a judgment has been denied full faith and credit, the burden of proof with respect to proving that law rests upon such person.

We believe we can point out material differences between the law for determining domicile in Georgia and that in Delaware, differences which make the question of domicile a materially different question in the two states and which might well produce different conclusions from the same evidence.[9] Should it develop at the argument, notwithstanding cases heretofore cited, that this Court felt that it might take judicial cognizance of the Georgia law, we would ask leave to file a supplemental brief on this point

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[9]Merely as an illustration, if the Court will look to the published Georgia statutes it will find great emphasis placed on the physical residence of the wife in Georgia. While *Ga. Code* §79-403 provides generally that the domicile of a married woman is that of her husband, nevertheless the *Ga. Code* §79-401, provides:

> "The domicile of every person of full age, and laboring under no disability, is the place where the family of such person shall permanently reside, if in this State. If he has no family, or they do not reside in this State, the place where such person shall generally lodge shall be considered his domicile."

Where the wife is the entire family of the husband, as in the case at bar, her physical place of residence in Georgia might very well, under these sections, control the domicile of both, if that residence were with his approval. This is wholly contrary to the fundamental idea expressed by the Delaware court as the law of Delaware in this case. (R. 222). Other points could be noted, but we do not elaborate.

also. At the present time we point out that the failure of petitioners to prove what constitutes domicile under Georgia law makes it impossible to say that domicile under that law means the same thing as domicile under the Delaware law, and hence makes it impossible to say that the Georgia finding was denied full faith and credit in Delaware.

This point cannot be answered by saying that both Georgia and Delaware would determine the question of domicile according to the principles of the common law. In the first place the Court cannot know judicially, in the absence of proof, that those general principles which we speak of as the common law have not been modified by statutes in Georgia. In the second place, legal thinking no longer supposes that there is any general system of law known as "the common law" existing at large as a sort of super-system of law. There is only the common law (that is, the decisional law) of the several states. Each state settles this part of the law for itself and the determination by each state in this respect is binding on all other courts.

Erie Railroad Co. v. Tompkins, 304 *U. S.* 64;

Klaxon Co. v. Stentor Electric Mfg. Co., decided June 2, 1941, 85 L. ed. 969, not yet published in bound official report.

Conclusion

The authorities cited demonstrate conclusively that the decision of the Delaware court herein rests upon principles long established, namely, that a probate judgment as a judgment in rem, binds only property within the state

where rendered, and as a judgment in personam, binds only parties and their privies. They also demonstrate that the administrator c. t. a. was not in privity with any of the parties to the Georgia proceedings, and that there is no substantial identity between the administrator c. t. a. and the distributees. To have bound the administrator c. t. a. by this judgment would have been a denial of due process of law. We might have ended the brief at this point, but the other difficulties in the way of petitioners herein which we have pointed out are also insurmountable.

Opposing counsel in the conclusion to their brief suggest that great hardship may be worked on Delaware corporations if the decision of the Delaware court is sustained. Presumptively, however, the Supreme Court of Delaware, itself, knows what is necessary for the protection of corporations organized under the law of that state. The suggestion of counsel that there would be difficulty in transfers of stock certificates in such corporations by personal representatives in the future is wholly imaginary. Any representative of a decedent, domiciliary or ancillary, can make such transfer in the absence of a contest from another representative.[10] Where such contest does develop, as here, an interpleader can settle the matter, as it did here. On the other hand, the rule for which opposing counsel contend would enable the family of a wealthy man upon his death to defeat the legitimate claims of the state of his true domicile and avoid the law of that domicile by the simple device of having all persons interested appear and subject themselves to another jurisdiction, which they might prefer.

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[10]Restatement, Conflict of Laws, §477 (2).

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR THE NEW YORK TRUST COMPANY, ADMINISTRATOR C. T. A.

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IN THE

Supreme Court of the United States

OF AMERICA

October Term, 1941.

No. 81.

JULIAN RILEY and HUGHES SPALDING, as Executors of the ESTATE OF JULIA M. HUNGERFORD, Deceased,

Petitioners,

vs.

THE NEW YORK TRUST COMPANY, as Administrator *C. T. A.* of the ESTATE OF JULIA M. HUNGERFORD, Deceased,

Respondent.

BRIEF ON BEHALF OF THE STATE TAX COMMISSION OF NEW YORK AS AMICI CURIAE.

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LESTER H. MARKS,
With him on the brief.

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INDEX TO BRIEF.

	PAGE
Statement	1
Argument	3

CASES CITED.

Baker v. Baker, Eccles & Co., 242 U. S. 394	3, 4, 7
Bigelow v. Old Dominion C. Min. & Sm. Co., 225 U. S. 111	8
Blood v. Kane, 130 N. Y. 514	8
Brigham v. Fayerweather, 140 Mass. 411	5
Brown v. Fletcher's Estate, 210 U. S. 82	9
Buck v. Hunter, 98 Vt. 163	9
Chicago, Rock Island & Pacific Railway Co. v. Schendel, 270 U. S. 611	9
Colorado v. Harbeck, 232 N. Y. 71	11
Dorrance cases, 309 Pa. 151; 287 U. S. 660; 287 U. S. 580; 116 N. J. L. 362; 298 U. S. 678	6
First National Bank v. Shuler, 153 N. Y. 163	9
Hansberry v. Lee, 311 U. S. 32	7
Ingersoll v. Coram, 211 U. S. 335	9
Litchfield v. Goodnow, 123 U. S. 549	8
Massachusetts v. Missouri, 308 U. S. 1	11
McCarthy v. Wood Lumber Co., 219 Mass. 566	9
Overby v. Gordon, 177 U. S. 214	3, 7
Stacy v. Thrasher, 6 How. 44	8
Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381	7
Texas v. Florida, 306 U. S. 398	6
Thormann v. Frame, 176 U. S. 350	3, 7
Tilt v. Kelsey, 207 U. S. 43	6
Troxell v. Del. Lack. & West. R. R., 227 U. S. 434	9
Worcester County Trust Co. v. Riley, 302 U. S. 292	2, 6

II.

OTHER CITATIONS.

	PAGE
American Law Institute's Restatement of Conflict of Laws, Section 470	7
Bigelow on Estoppel, 6th ed. 145	9
Georgia Laws, Extra Session 1937-8, p. 102	11
Greenleaf on Evidence (Lewis's Edition), Section 523	8
"Practical Solution of the Double Domicile Problem" "Trust Bulletin" published by American Bankers Association—Vol. 20, No. 10, June, 1941	6
Schouler on Wills, Executors and Administrators (Sixth Edition) Vol. 3, pp. 1672-3	10

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Respondent.

BRIEF ON BEHALF OF THE STATE TAX COMMISSION OF NEW YORK AS AMICI CURIAE.

This case presents the question of whether a decree in one state admitting a will to probate must be accepted as conclusive on decedent's domicile, under the "full faith and credit" clause, by the courts of the state of incorporation of a corporation, stock in which was owned by the decedent, where an administrator

c. t. a. of a third state claims such stock on the ground that the decedent was domiciled therein.

This brief is submitted on behalf of the State Tax Commission of New York because it is interested generally in the administration of the assets of estates in so far as it may affect the collection of state death taxes and specifically because it seeks to collect any estate taxes that may be due it from the estate of Julia M. Hungerford, decedent herein.

The specific interest of the State Tax Commission appears from the following facts. Julia M. Hungerford, decedent herein, died on November 28, 1935 (R. 8). On January 22, 1936 a temporary administrator was appointed by the Surrogates' Court of New York County, New York on the petition of O. Robert Hungerford, decedent's husband (R. 63-73). On June 12, 1936, the State Tax Commission of New York commenced a proceeding for the probate of the decedent's will by filing a petition in said Surrogates' Court (R. 76-84). Said proceedings were stayed by reason of an injunction order against the Commission in an action for interpleader under the Federal Interpleader Act instituted in the District Court of the United States for the Southern District of Georgia. After such injunction had been dissolved because of the decision of this Court in *Worcester County Trust Co. v. Riley*, 302 U. S. 292, said Surrogates' Court made an order on February 14, 1938 in which it consolidated said proceeding of the State Tax Commission with a proceeding which had been commenced by the decedent's husband in October 1937 also for the probate of decedent's will (R. 124-129). Said Surrogates' Court made a de-

cree on the same day admitting decedent's will to probate and continuing the above mentioned temporary administrator. The decree admitting the will to probate contained a finding that the decedent was domiciled in New York at the time of her death (R. 127). On April 26, 1938, said Surrogates' Court, upon the petition of the State Tax Commission and the decedent's husband, appointed the New York Trust Company as administrator *c. t. a.* (R. 131-2).

ARGUMENT.

A state having assets in its jurisdiction is not compelled to give full faith and credit to a probate decree of another state on the question of decedent's domicile.

The question presented in this proceeding, as *amici curiae* view it, is whether the decree of the Georgia court admitting the decedent's will to probate as a resident of that state, must be accorded full faith and credit by the courts of Delaware with respect to the question of where the decedent was domiciled at the time of her death.

Amici curiae submit that to compel the Delaware courts to accept the Georgia decree as determinative of decedent's domicile would be contrary to reason and authority.

Viewed as an *in rem* judgment a decree admitting a will to probate affects only property within the state.

Thormann v. Frame, 176 U. S. 350;
Overby v. Gordon, 177 U. S. 214;
Baker v. Baker, Eccles & Co., 242 U. S. 394.

In *Baker v. Baker, Eccles & Co., supra,* full faith and credit was claimed in Kentucky for a Tennessee judgment of administration. In denying the claim this Court said (pp. 400-1):

> "We have no concern with the effect of the Tennessee judgments upon the distribution of so much of decedent's personalty as was situate within that State. The present action affects only the ownership of shares of stock in a Kentucky corporation having no *situs* outside of its own State, so far as appears, and a claim of indebtedness against the same corporation. * * * No State need allow property of a decedent to be taken without its borders until debts due to its own citizens have been satisfied; and there is nothing in the Constitution of the United States aside from the full faith and credit clause to prevent a State from giving a like protection to its own citizens or residents who are interested in the surplus after payments of debts. All of which goes to show, what plaintiff in error in effect acknowledged when she brought her present action in a Kentucky court, that the Tennessee judgments had no effect *in rem* upon the Kentucky assets now in controversy. * * *"

Additional reasons support the view that the full faith and credit clause should not be invoked to give extra-territorial force to a decree admitting a will to probate.

The question of domicile in a probate proceeding is one that is ordinarily decided *pro forma* by the court. A petition is presented which alleges that the dece-

dent was a resident of the state. Upon such petition, after usually perfunctory proof by subscribing witnesses, a will is admitted to probate. In the vast majority of cases the proceeding is unopposed and the question of domicile rarely litigated. In a similar connection Mr. Justice Holmes in *Brigham v. Fayerweather*, 140 Mass. 411, in considering whether a probate decree was even evidence of the mental capacity of a decedent said (page 414):

> "For except in the comparatively small number of cases where the probate of the will is opposed, the investigation of the fact is necessarily only formal."

The fact that all of the states of the Union (except Nevada) have death taxes and that the rates of many states vary, gives additional support to the hitherto accepted rule in this Court. To accord full faith and credit to a decree in one state admitting a will to probate in the courts of other states wherein assets are located would encourage evasion of state death taxes. The heirs and distributees of an estate by submitting themselves to the jurisdiction of a probate court of a state with lower death tax rates could obtain a decree which would be entitled to full faith and credit in all other states. A state which was the true domicile of the decedent, but which had no assets or from which assets had been removed, would be unable to enforce its taxes in a third state because it would be met conclusively by a probate decree that must be given full faith and credit.

If a probate decree be entitled to full faith and credit in a state which does not claim decedent's domi-

cile but where assets are located, then *amici curiae* are unable to see why it is not entitled to full faith and credit in any proceeding, including a tax proceeding, in a state claiming domicile. Yet it has been consistently held that the courts of two or more states may each decide that a decedent was domiciled therein for purposes of state death taxes and that a decree of one state adjudging a decedent to be domiciled therein for purposes of taxation is not entitled to full faith and credit in another state.

Tilt v. Kelsey, 207 U. S. 43;
Worcester County Trust Co. v. Riley, 302 U. S. 292;
Texas v. Florida, 306 U. S. 398.

While the State Tax Commission of New York recognizes the inequity of double domicile in death taxation, as graphically illustrated by the *Dorrance* cases (309 Pa. 151, cert. denied, 287 U. S. 660; 287 U. S. 580; 116 N. J. L. 362, cert. denied 298 U. S. 678), and in fact has taken the lead in attempting a solution among the states so that an estate may not be subjected to more than one domiciliary death tax,* it is of the opinion that a decision in the case at bar that a decree of a probate court of one state must be accorded full faith and credit in other states, would not aid in solving the problem, but instead would encourage the evasion of state death taxes.

Finally, a probate decree should not be given full faith and credit on the question of domicile because to do so would lead to absurd results. Since two states

*"A Practical Solution of the Double Domicile Problem"—"The Trust Bulletin" published by American Bankers Association—Vol. 20, No. 10—June, 1941.

may each admit a decedent's will to probate upon the theory that he was domiciled in each state at the time of his death (*Thormann v. Frame, supra,* 176 U. S. 350; *Overby v. Gordon, supra,* 177 U. S. 214; *Baker v. Baker, Eccles & Co., supra,* 242 U. S. 394), a third state may be confronted with conflicting decrees each of which would be entitled to full faith and credit. Hence, it is inevitable that neither decree can be conclusive, but that the third state must have power to determine for itself the question of domicile and the disposition of assets within its jurisdiction.

The Georgia decree is not binding on the New York administrator.

The Georgia decree is not entitled to full faith and credit because (a) the New York administrator was not a party to the Georgia proceeding and (b) he was not in privity with any party to that proceeding.

Viewed as an *in personam* judgment, the Georgia decree only binds the parties to that proceeding, and since the New York administrator was not a party, he is not bound by the Georgia decree (*Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381, 402; *Hansberry v. Lee,* 311 U. S. 32). The rule is succinctly stated in American Law Institute's Restatement of Conflict of Laws, Section 470, as follows:

"* * *

"(3) A judgment in administration proceedings in any state is conclusive upon all persons who became subject to the jurisdiction of the court in such proceedings.

"(4) If an issue as to the state in which a decedent was domiciled at the time of his death is

raised by a person not precluded from raising this issue under Subsection (3), a court will not regard itself as concluded by a prior finding made in another state as to the place of the decedent's domicile."

Petitioners apparently contend that although the New York administrator was not a party to the Georgia proceeding, he is in privity with the decedent's husband who was a party to such proceeding and that said administrator is therefore bound by the Georgia decree.

It is clear that the New York administrator is not in privity with decedent's husband. Privity means mutual succession or relationship to the same rights of property (Greenleaf on Evidence, (Lewis's Edition) Section 523; *Stacy v. Thrasher*, 6 How. 44, 58; *Litchfield v. Goodnow*, 123 U. S. 549; *Bigelow v. Old Dominion C. Min. & Sm. Co.*, 225 U. S. 111, 128). The New York administrator is not identified in interest with decedent's husband. The former does not claim through the latter, the latter does not claim the same property rights as the former. The interests represented by both are entirely different. The decedent's husband represents himself. The administrator is an officer of the court. He represents the creditors and legatees (*Blood v. Kane*, 130 N. Y. 514).

The fact that decedent's husband, in addition to the State Tax Commission of New York, petitioned for the appointment of the administrator in New York is immaterial. Even if the New York administrator had been appointed on the sole petition of decedent's husband, or if he had been appointed administrator him-

self, the New York administrator would not be bound by the Georgia decree.

Troxell v. Del. Lack. & West. R. R., 227 U. S. 434;
Ingersoll v. Coram, 211 U. S. 335;
Brown v. Fletcher's Estate, 210 U. S. 82;
First National Bank v. Shuler, 153 N. Y. 163;
McCarthy v. Wood Lumber Co., 219 Mass. 566;
Buck v. Hunter, 98 Vt. 163.

Petitioners' reliance on *Chicago, Rock Island & Pacific Railway Co. v. Schendel*, 270 U. S. 611, is misplaced. There the court found an identity of interests between the plaintiff in both cases and hence an estoppel by reason of the full faith and credit clause. In that case this Court said at page 620:

> "Indentity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, Bigelow on Estoppel, 6th. ed. 145; and parties nominally different may be, in legal effect, the same."

The New York administrator is in form and substance wholly different from the decedent's husband and the fact that the latter appeared in the Georgia proceeding does not bind the former.

Petitioners contend that since all parties interested in succession were before the Georgia court, the decree of that court is binding. Petitioners confuse administration and succession.

The litigation in Delaware relates to the administration of decedent's personal estate, not to its succession. Nowhere in the comprehensive decree of the Delaware Supreme Court is any mention made of the distribution of the property which was the subject

matter of the action. The court merely found that the New York administrator represented the domiciliary administration and directed the delivery of the stock to it. As the Court pointed out in its opinion, there is nothing which precludes the Georgia executors from contending that Mr. Hungerford, having litigated the issue of domicile in Georgia, is personally bound by the decree there rendered. But while the courts, either of New York or Georgia or both, may be obliged to hold that Mr. Hungerford's distributive share must be determined by the law of Georgia because he personally is bound by the Georgia decree, that does not determine the place of administration.

The difference between administration and distribution is shown in *Schouler on Wills, Executors and Administrators* (Sixth Edition) Vol. 3. It is said (pp. 1672-3):

> "The main objects proposed are these: that the personalty of the deceased be properly collected, preserved, and (together with income and profits) duly accounted for; that his just debts and the charges consequent upon his death and the administration of his estate be paid and adjusted, * * * that the distribution and division of the residue or surplus of the estate be made among such persons and in such proportions as the will of the deceased, if there be one, otherwise the statute of distributions, may have prescribed. *The primary purpose of administration is to collect the assets and to pay debts, and distribution is only an incident.*" (Italics supplied.)

The fact that all persons interested in succession were before the Georgia court is immaterial since different persons are interested in administration.

At page 17 of their brief petitioners assert that "neither the State of New York nor anyone else claiming as a creditor is affected by the finding of a domicile in the Georgia proceeding." While it may be that neither the State of New York nor the New York creditors are affected by the Georgia finding, yet they are seriously affected if such finding is deemed conclusive in Delaware. If the Georgia decree must be accorded full faith and credit and the assets of the estate are transmitted to Georgia for administration, it is doubtful that the State of New York, even though upon petitioners' concession it might assess its death taxes, could enforce their collection in the Georgia courts in view of the statute of that state permitting the collection of taxes of other states on a reciprocal basis (Ga. Laws, Extra Session 1937-8, p. 102), and in view of *Colorado v. Harbeck*, 232 N. Y. 71. While *Massachusetts v. Missouri*, 308 U. S. 1, may remove any constitutional objection to a suit by New York in Georgia, the courts of that state, under the above mentioned statute, are apparently closed to New York. If the Georgia decree is accorded full faith and credit and the assets transmitted to Georgia, the New York creditors are obviously affected since they would be compelled to assert their claims in Georgia.

All of which is respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 81

JULIAN RILEY AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,

Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C.T.A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

PETITION FOR REHEARING BY JULIAN RILEY AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED.

DAN MCDOUGALD,
JAMES A. BRANCH,
ROBERT S. SAMS,
AARON FINGER,
Counsel for Petitioners.

INDEX.

Table of Cases Cited.

	Page
Baker v. *Baker, Eccles & Co.*, 242 U. S. 394	8
Brigham v. *Fayerweather*, 140 Mass. 411, 5 N. E. 265	2
Dallinger v. *Richardson*, 176 Mass. 77, 57 N. E. 224	2
Hungerford v. *Spalding*, 183 Ga. 547	4
Martin's Estate, In re, 240 N. Y. S. 393, aff'd., 174 N. E. 753	8
Tilt v. *Kelsey*, 207 U. S. 43	2, 6
Wilkins v. *Ellett*, 9 Walk. 740	5

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THE NEW YORK TRUST COMPANY, ADMINISTRATOR C.T.A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, ET AL.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, Deceased, petitioners in the above-entitled cause, and present this their petition for a rehearing of the above-entitled cause, and in support thereof respectfully show:

I.

It is apparent from both the majority opinion and the concurring opinion that the Court, in affirming the judgment of the court below, did so on the idea that unless this were done the judgment probating the will in Georgia and adjudicating the domicile of the testate would foreclose the right of the State of New York to assert its claim for

taxes which may be lawfully due, without that State having an opportunity to be heard on the question. The Court, we respectfully submit, has overlooked the fact that to give effect to the Georgia judgment in the Delaware proceedings would not in law produce such a result, for that:

(a) The question of the decedent's domicile as regards the claim of New York for inheritance taxes is separate and apart from the issue of the decedent's domicile in the determination of whether or not the probate is to be a general probate. In the former instance the determination of domicile establishes the claim; in the latter instance it establishes the succession.

(b) The tax claimant, not being entitled to be heard on the probate of the will, is not bound by the finding of decedent's domicile in that proceeding. This was the precise ruling in

Tilt v. *Kelsey*, 207 U. S. 43, text 51, 52

citing

Brigham v. *Fayerweather*, 140 Mass. 411; 5 N. E. 265,

and

Dallinger v. *Richardson*, 176 Mass. 77, 57 N. E. 224,

in which the tax claimant was a Massachusetts municipality.

(c) That a tax claimant or creditor is not entitled to be heard on the probate of a will and is not bound by the judgment therein is the statute law of Georgia. This is clear from Code Section 113-602 (R. 16) from which we quote:

> "Probate by the witnesses or probate in solemn form is the proving of the will *after due notice to all the heirs at law.* * * * Such probate is conclusive upon all the parties notified and all the legatees under the will who are represented in the Executor." (Italics ours)

The part we have italicized was not included in the quotation from this Section in the majority opinion (top of p. 7).

(d) The interpleader suit filed by the Executors (¶33 of the petition, R. 92) is consistent only with the viewpoint that the finding of domicile in the probate proceedings was not binding on the State of New York either to defeat its claim or to establish that of the State of Georgia for inheritance taxes.

(e) Throughout the litigation it was freely admitted that neither a tax claimant nor creditor was entitled to be heard on the probate and likewise that the judgment of probate was not binding on the New York Tax Commission as to its claim for inheritance taxes, and so admitted in the brief of respondent in this Court.

(f) Any legal bar to a suit for these taxes in Georgia is not due to the judgment of probate but to the fact that New York would not permit the State of Georgia to sue for taxes in the New York courts. (Respondent's brief, pp. 29 and 30.)

(g) The question in Delaware was not whether the State of New York or its Taxing Commission was entitled to collect estate or inheritance taxes from the representatives of this estate. If such had been the case, no contention would have been made that the Georgia judgment concluded that question adversely to the contentions of New York. The only issue involved was which representative succeeded to the title to the stock as the general or domiciliary representative of the estate. The decree of the Delaware Court was that the respondent had succeeded to the title of Julia M. Hungerford to the shares of stock in controversy by virtue of its appointment as administrator c. t. a., and that the Executors did not succeed to the title

by reason of the probate of the will in Georgia. (R. 237-238).

No effort has been made on the part of the respondents or the taxing authorities of the State of New York, either through the respondents or by direct intervention, to collect inheritance taxes in the Delaware litigation out of the stock in question even though this stock was in the possession of a court of equity with the full powers inherent in this situation. Likewise, there was no effort to establish and collect the claims of New York creditors. In fact, there was no proof that there were any such creditors, and the implication is to the contrary. [See our reply brief, p. 11 (R. 183-184)]

(h) The Delaware Court, in examining the question of decedent's domicile at the instance of the New York Trust Company, as Administrator, c. t. a., denied full faith and credit to the Georgia judgment by reason of the fact that the issue in Delaware involved solely the succession to the decedent's title to the stock in question and that issue turned upon the question as to whether or not the Georgia judgment was a general probate vesting in the Executors title to all the personalty of the estate wherever situated by binding all distributees on the question of the decedent's domicile. The issue in Delaware did not involve the question of the estate's liability to creditors or for taxes. That the Georgia judgment was a general probate was concluded by the decision in *Hungerford* v. *Spalding*, 183 Ga. 547, 550, (R. 108) and the fact that all possible distributees were parties to the Georgia proceedings.

II.

In the majority opinion, the Court, while recognizing the rule that a claimant other than a distributee is not entitled to be heard on the general probate of a will, has

held that an administrator representing such a claimant only may, nevertheless, in another state, challenge the title of the estate representative established in such general probate proceedings. This, we submit, is hardly consistent with the rule that he is not entitled to be heard in the first instance. Heretofore, a tax claimant or creditor has had no interest except in the payment of his claim and consequently his interest, together with that of the distributees, has been fully protected by a general administration, with the additional right of creditors and tax claimants to a limited or local administration where local assets are made available for the payment of local creditors before transfer to the general or domiciliary representative for payment of other creditors and for distribution. In so holding and permitting an administrator who represents only local claimants to go outside the state of his appointment and successfully challenge the title of the executor appointed in a general probate where all persons interested as beneficiaries under the will or heirs at law were before the court, the Court has ignored or overlooked the legal effect of such judgment of probate and the title of the Executors established thereby.

Wilkins v. *Ellett*, 9 Wall. 740 (R. 225).

III.

The effect, we submit, of the majority opinion and the concurring opinion of the court is that, notwithstanding the fact that the general or domiciliary administration has been determined in one State in proceedings to which all the heirs at law and beneficiaries were parties, another State asserting a claim for estate or inheritance taxes or having resident creditors may insist on a general or domiciliary administration under the supervision of its own

courts for the purpose of enabling it to assert there its claim for taxes and to satisfy the claims of resident creditors. That a creditor or tax claimant is entitled to a domiciliary administration to facilitate the payment of his claim is, we submit, a radical departure from principles heretofore recognized in the administration of estates.

The court has overlooked the legal effect of an administration which represents no possible distributees but only creditors and tax claimants. Such an administration cannot be a general administration and is a limited administration only, confined in its operation to the state of its appointment. Any other rule would result in defeating the title of the general representative appointed in proceedings to which all persons interested were parties, and would bring about embarrassment and confusion in the administration of estates.

This Court said, in *Tilt* v. *Kelsey*, 207 U. S. 43, 56:

> "• • • But somewhere the power must exist to decide finally, as against the world, all questions which arise in the settlement of the *succession*. Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely. • • •" (Italics ours.)

We submit that the only rights of a claimant, whether an ordinary creditor or taxing authority, have been (1) to have a local administration of local assets for the benefit of local creditors, and (2) to be paid by the domiciliary representative (wherever located) from the assets of the estate before distribution to the heirs or beneficiaries. That he had no right to have a domiciliary administration solely for his benefit has been due to the fact that he was not interested in questions involving the succession and

such rights have been based on the proposition that a claimant's only interest was in being paid the amount of his claim as he had no concern with other matters with which the distributees were interested.

The effect of the court's decision is to create a third type of administration, to-wit, a general administration of a limited nature, under which the estate representative seeks to collect all assets of the estate wherever located, which assets are as in a local administration utilized to pay local or resident creditors (among which we include a tax claimant such as the New York Tax Commission) and the residue remaining transmitted to the general administrator possessing the right to make distribution of the residue to the distributees.

This third type of administration is not necessary for the reason that a state (including the State of New York) may assert its tax claims in direct proceedings without the necessity of a general administration.

On page 8 of the majority opinion is the suggestion that a state has the sovereign right of general administration of a decedent's estate although there are no creditors, distributees, tax claimants or no assets within the state. Such right has not heretofore been recognized.

Tilt v. *Kelsey, supra*, from which we quote (text p. 55):

> "When the owners of property die, that property, under the conditions and restrictions of the law applicable, is transmitted to their successors named by their wills or by the laws regulating inheritance in cases of intestacy. For a suitable time it is essential that the property should remain under the control of the State, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. It is in the public interest that the property should come under the control of the new

owners, after such delays only as will afford opportunity for investigation and hearing to guard against mistake, injustice or fraud. It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it."

We submit that any other rule would result in embarrassment and confusion in the administration of estates. Such a right is certainly not recognized by the courts of the State of New York. When the State of Connecticut, through a "general representative" sought to obtain assets in the hands of a New York estate representative, for the sole purpose of exacting inheritance taxes, the application was denied by New York even though it was admitted that decedent was a resident of Connecticut and the taxes were due.

In re Martin's Estate, 240 N. Y. S. 393, affirmed 174 N. E. 753.

IV.

While the court in its decision in this case recognizes the effect of a general probate where all of the property is within the jurisdiction of the court, it has overlooked the rule that the same result follows where all of the distributees are before the court. We submit that the latter is the ruling announced in *Baker* v. *Baker, Eccles & Company*, 242 U. S. 394. We quote from the text (p. 400):

"How is the fact of decedent's domicile to be judicially ascertained as a step in determining what law is to govern the distribution? Obviously, if fundamental principles of justice are to be observed, the ascertainment must be according to due process of law, that is, either by a proceeding *in rem* in a court having

control of the estate, or by a proceeding *in personam* after service of process upon the parties to be affected by the judgment."

This is true because in both instances all possible distributees are bound by the judgment and in neither instance are creditors or tax claimants bound because they are not entitled to be heard as their rights are not in issue. *Tilt* v. *Kelsey, supra.*

The issue of domicile in establishing a claim for inheritance or estate taxes is a collateral issue to that of the issue of domicile in establishing the place and the fact of domiciliary administration. This is so because of the difference in the results which follow from the determination of domicile in the two classes of cases. In the former, liability for estate or inheritance taxes is established, while in the latter the title of the estate representative to all personalty wherever situated is determined together with the law applicable to the distribution of the estate. This is the precise ruling of this Court in *Tilt* v. *Kelsey, supra,* where a will was probated in New Jersey as that of a resident and New York sought to collect inheritance taxes on the basis that the testate was a resident of New York. We quote (text 51):

> "In the consideration of this question, the first inquiry which presents itself is whether the adjudication of the New Jersey court, that Tilt was at the time of his death a resident of New Jersey, was conclusive upon the State of New York, a stranger to the proceedings. If it was that is the end of the case, because then New York could not take the first step necessary to bring the estate within the provision of the tax law of that State. But upon principle and authority that adjudication, *though essential to the assumption of juris-*

diction to grant letters testamentary, was neither conclusive on the question of domicil, nor even evidence of it in a *collateral* proceeding." (Italics ours.)

We respectfully submit that while there may be contradictory findings as to the domicile of a decedent in determining whether the probate or administration is general or not, yet wherever such conflict has occurred it has been at the instance of a distributee who was not bound by the other adjudication or at the instance of a personal representative of such distributee, and in all instances where the persons relying upon these conflicting adjudications were brought before the court, the question of the nature of the administration was finally determined. We respectfully submit that the same result follows in law where all of the persons interested in the succession are before the court in the first instance.

In no instance has a creditor been permitted to raise either in the first instance or by collateral attack the question as to whether or not the probate or the administration was a general probate or a general administration. Likewise, no case cited has held that a creditor or claimant was bound by such adjudication of domicile in the determination of the fact, amount or rank of his claim.

We respectfully submit that the Delaware Court, when it examined the question of decedent's domicile at the instance of the New York Trust Company as Administrator, c. t. a., who represented only possible New York creditors and a tax claimant, failed to give full faith and credit to the Georgia judgment because that judgment determined the succession and the succession was not involved in the validity or amount of the claim represented by the New York Trust Company as Administrator, c. t. a. The Delaware Court should first have determined the legal effect of the Georgia judgment of probate in the light of the fact that

all possible distributees were parties thereto and bound thereby, as did this Court in *Tilt* v. *Kelsey*, and it would then have found that regardless of whether or not that judgment of general probate be a proceeding *in rem* or a proceeding *in personam*, it established the title of the Executors which neither a creditor or tax claimant or any stranger not entitled to be heard in that proceeding could dispute, and likewise that the finding of domicile in that proceeding would not in either instance have concluded such a person on the issue of domicile if it were material to any claim against the estate. Had the Delaware Court done this, it would have recognized the established title of the Executors to the stock and that the New York Tax Commission and any New York creditor were free to establish their right to collect their respective claims, *but they could not dispute the title of the Executors.* In this connection, we again quote from *Tilt* v. *Kelsey* (text 52) in which the Court quoted from *Brigham* v. *Fayerweather:*

> "* * * We may lay on one side, then any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes."

The Court then said:

> "We think that this quotation expresses the correct rule and that it is sustained by the decisions of this court. Applying it here, it follows that the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicil. On the contrary, it is open to the courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased."

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Supreme Court of Delaware be upon further consideration reversed.

Respectfully submitted,

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I, Dan MacDougald, of counsel for the above-named petitioners, do certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

Respectfully submitted,

DAN MACDOUGALD.

SUPREME COURT OF THE UNITED STATES.

No. 81.—October Term, 1941.

Julian Riley and Hughes Spalding, Executors of the Estate of Julia M. Hungerford, Deceased, Petitioners,
vs.
The New York Trust Company, Administrator C. T. A. of the Estate of Julia M. Hungerford, Deceased, et al.

On Writ of Certiorari to the Supreme Court of the State of Delaware.

[February 16, 1942.]

Mr. Justice Reed delivered the opinion of the Court.

Coca-Cola International Corporation, incorporated in Delaware, filed a bill of interpleader in a Delaware Court of Chancery against Julian Riley and Hughes Spalding, petitioners here, the Executors of Mrs. Julia M. Hungerford, with letters testamentary issued by the Court of Ordinary of Fulton County, Georgia, and against The New York Trust Company, the respondent, a New York corporation, as temporary administrator (afterward administrator c. t. a.) of the same decedent, appointed by the Surrogate's Court for New York County, New York.

The Georgia executors and the New York administrator each claim the right to have transferred to them in their representative capacity stock in the Coca-Cola corporation now on its books in the name of the decedent. The outstanding certificates are in Georgia in the hands of the Georgia executors. The parties are agreed, and it is therefore assumed that Delaware is the situs of the stock. In accordance with the prayer of the bill, the Delaware court directed the adversary claimants to interplead between themselves as to their respective claims.

The Georgia executors assert that original domiciliary probate of Mrs. Hungerford's will in solemn form was obtained by them in Georgia with all beneficiaries and heirs at law of testatr[illegible], including her husband, Robert Hungerford, actual parties by personal service. These, it is conceded, were all the parties under the law of Georgia entitled to be heard on the probate of the will. The re-

spondent administrator c.t.a. was not a party. The record of probate includes a determination by special finding, over the objection of the caveator, the husband, that the testatrix was domiciled in Georgia. The special finding was specifically approved as an essential fact to determine the jurisdiction of the Court of Ordinary by the highest court of Georgia in its affirmance of the probate. *Hungerford* v. *Spalding*, 183 Ga. 547, 189 S. E. 2.

These facts were alleged by petitioners in their statement of claim to the stock filed below in response to the decree of interpleader. Exemplified copies of the probate record of the several Georgia courts were pleaded and proven as were the applicable Georgia statutes governing domiciliary probate. From the facts alleged, petitioners inferred the conclusive establishment of the place for domiciliary distribution against "all persons" and prayed the issue to them of new certificates. An offer was made to pay all Delaware taxes or charges on the stock. At the trial petitioners relied upon Article IV, Section 1, of the Federal Constitution,[1] the full faith and credit clause, as determinative of their right to the new certificates. The pleading and trial contention adequately raised the Constitutional question. *Tilt* v. *Kelsey*, 207 U. S. 43, 50.

Respondent admitted that all parties entitled under the law of Georgia to be heard in opposition to probate were actually before the Georgia courts. It denied that Mrs. Hungerford was domiciled in Georgia or that the Georgia judgment of domicile and probate was binding on it, and averred testatrix' domicile at death was New York. It further averred that there were New York creditors of the estate interested in the proper and lawful administration of the estate, and that New York had certain claims for inheritance and estate taxes. Its own subsequent appointment by the Surrogate's Court of New York County, New York, on the suggestion of testatrix' husband and the State Tax Commission, was pleaded with applicable provisions of New York probate and estate tax law. By stipulation it was established that petitioners and the heirs and beneficiaries of testatrix, except her husband who was an actual party, were notified of the New York proceedings for probate only by publication or substituted service of the citation in

[1] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Georgia and did not appear. As a domiciliary administrator c.t.a. the respondent prayed the issue to it of new certificates for the stock in controversy.

The trial court concluded from the evidence adduced at the hearings that the testatrix was domiciled in Georgia. It was therefore, as the court stated, unnecessary for it to consider the binding effect of the Georgia judgment.[2] The Supreme Court of Delaware reversed this finding of fact, determined that New York was testatrix' domicile and denied petitioners' contention that Article IV, Section 1, of the Constitution required the award of the certificates of stock to the Georgia executors. The Coca-Cola Corporation was directed to issue its stock certificate to the respondent, the New York administrator c. t. a. *New York Trust Co.* v. *Riley*, 16 A. 2d 772. Because of the importance of issues previously undecided by this Court, certiorari was granted to review the alleged error, to wit, the asserted denial of full faith and credit to the Georgia judgment. — U. S. —.

The constitutional effect of the Georgia decree on a claim in his own name in another state by a party to the Georgia proceedings is not here involved.[3] The question we are to decide is whether this Georgia judgment on domicile conclusively establishes the right of the Georgia executors to demand delivery to them of personal assets of their testatrix which another state is willing to surrender to the domiciliary personal representative[4] when another representative, appointed by a third state, asserts a similar domiciliary right. For the purpose of this review the conclusion of Delaware that the testatrix was in fact domiciled in New York is accepted. The answer to the question lies in the extent to which Article IV, Section 1, of the Constitution, as made applicable by R. S. § 905,[5] nevertheless controls Delaware's action.

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2 Coca-Cola International Corp. v. New York Trust Co., 2 A. 2d 290, 8 A. 2d 517.

3 The Supreme Court of Delaware was of this opinion. It said: We are not "called upon to consider the operation of a judgment in a probate proceeding in one jurisdiction as an estoppel against one who, although a party to that proceeding, undertakes, in a proceeding in another jurisdiction affecting the same decedent's estate, to raise again the question of the decedent's domicile." 16 A. 2d 772, 788.

4 Cf. Page, Wills (3d Ed.) § 727.

5 "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." 28 U. S. C. § 687.

This clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are at rest. Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions. Each state could control its own courts but itself could not project the effect of its decisions beyond its own boundaries. Cf. *Pennoyer* v. *Neff*, 95 U. S. 714, 722. That clause compels that controversies be stilled so that where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered. *Roche* v. *McDonald*, 275 U. S. 449, 451. This is true even though the cause of action merged in the judgment could not have been enforced in the state wherein the enforcement of the judgment is sought. *Christmas* v. *Russell*, 5 Wall. 290, 302; *Fauntleroy* v. *Lum*, 210 U. S. 230, 236.[6] By the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here.

The Constitution does not require, *M'Elmoyle* v. *Cohen*, 13 Peters 312, 328; *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276, nor does Delaware provide that the judgments of Georgia have the force of those of her own courts. A suit in Delaware must precede any local remedy on the Georgia judgment. Subject to the Constitutional requirements, Delaware's decisions are based on Delaware jurisprudence. Her sovereignty determines personal and property rights within her territory. Subject to Constitutional limitations, it was her prerogative to distribute the property located in Delaware or to direct its transmission to the domiciliary representative of the deceased. *Iowa* v. *Slimmer*, 248 U. S. 115, 121. The full faith and credit clause allows Delaware in disposing of local assets to determine the question of domicile anew for any interested party who is not bound by participation in the Georgia proceeding. *Thormann* v. *Frame*, 176 U. S. 350, 356; *Overby* v. *Gordon*, 177 U. S. 214, 227; *Burbank* v. *Ernst*, 232 U. S. 162; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 400. It must be admitted that this reexamination may result in conflicting decisions upon domicile.

[6] There are limitations on the generality of the statement. Pacific Ins. Co. v. Comm'n, 306 U. S. 493, 502, and cases there cited.

but that is an inevitable consequence of the existing federal system which endows its citizens with the freedom to choose the state or states within which they desire to carry on business, enjoy their leisure or establish their residences. *Worcester County Co.* v. *Riley*, 302 U. S. 292, 299.[7] But while allowing Delaware to determine domicile for itself, where any interested party is not bound by the Georgia proceedings, the full faith and credit clause and R. S. § 905, note 5, *supra*, do require that Delaware shall give Georgia judgments such faith and credit "as they have by law or usage" in Georgia.

We note but need not discuss at length the respondent's contention that our application of Georgia law is limited to the statutes, decisions and usages of that state pleaded or proven in the Delaware proceedings[8] and that for such further rules of law as may be needed to reach a conclusion here, we must necessarily, in reviewing a Delaware judgment, rely upon the law which, in the absence of proof of other Georgia law, properly guided the state courts, that is the Delaware law.[9] At any rate, the cases relied upon by petitioners to establish the Georgia law, *Tant* v. *Wigfall*, 65 Ga. 412, and *Wash* v. *Dickson*, 147 Ga. 540, 94 S. E. 1009, are cited in the opinion of the Supreme Court of Georgia pleaded in these proceed-

[7] A collection of cases dealing with this topic may be found in 121 A. L. R. 1200.

[8] Adam v. Saenger, 303 U. S. 59, 62, 63; Gasquet v. Lapeyre, 242 U. S. 367; Tilt v. Kelsey, 207 U. S. 43, 57; Chicago and Alton R. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 622; Hanley v. Donoghue, 116 U. S. 1, 6.

Del. Rev. Code (1935) § 4695—"Statutes of Other States:—Printed copies of Statutes of any other of the United States, if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts, shall be prima facie evidence of such law."

Del. Rev. Code (1935) § 4696—"Common Law of Other States:—The common, or unwritten, law of any other of the United States, may be proved as facts by parole evidence; and the reports of cases adjudged in their courts, and published by authority, may also be admitted as evidence of such law."

In 1899 the Superior Court clearly stated the rule: "It is a general rule of law that whenever a foreign statute is relied upon it must be pleaded, and this court will not take judicial notice of the laws of our sister states or of a foreign country." Thomas v. Grand Trunk Railway Co., 1 Pennewill 593, 596, 42 A. 987, 988. This rule has been quite strictly applied in subsequent cases. Wolf v. Kragy, 3 W. W. Harr. 362, 136 A. 520 (Super. Ct. 1927); Mackenzie v. Omar, 4 W. W. Harr. 435, 154 A. 883 (Super. Ct. 1929); Nye v. Felton, 5 W. W. Harr. 236, 162 A. 504 (Super. Ct. 1931); Royal Ins. Co. v. Simon, 20 Del. Ch. 297, 174 A. 444 (1934); Holland v. Univ. Life Co., 7 W. W. Harr. 39, 180 A. 328 (Super. Ct. 1935); Silverman v. National Assets Corp., 12 A. 2d 389 (Del. Ch. 1940).

[9] Bource v. Trust Francais, 14 Del. Ch. 332, 127 A. 56. Of this law, we take judicial knowledge. Owings v. Hull, 9 Pet. 607, 624; Bowen v. Johnston, 306 U. S. 19, 23.

ings. We think they may be considered by us under the Delaware law. No objection below was made by respondent to the citations. The opinion of the Georgia Supreme Court was properly in the record and, in the absence of a contrary ruling by Delaware, we are of the view that they may be properly considered here.[10]

We find nothing in either of these cases, however, which would lead to the conclusion that in Georgia, the New York administrator c. t. a. was in privity, so far as the sequestration of assets for the payment of death taxes or indebtedness of decedent or her estate is concerned, with any parties before the Georgia court, or that the New York representative could not take steps in Georgia courts which might result in its getting possession of any assets which under the Georgia law of administration would be properly deliverable to a foreign domiciliary administrator. In the *Tant* case, Georgia refused to permit a collateral attack on a judgment of probate allegedly entered without jurisdiction of the subject matter. It was held that such attack must be made in the court where judgment was rendered. The effect of a judgment entered without jurisdiction of the persons whose rights were purportedly affected was not discussed. In the *Wash* case, there was simply a ruling that a judgment of the court of ordinary could not be collaterally attacked by parties or privies, unless the record negatived the existence of necessary "jurisdictional facts." Whom the court would classify as "privies" to a judgment *in personam* does not appear, and the opinion of the court below makes it amply plain that there was no privity under Delaware law. Hence, if the Georgia judgment is to bind the New York administrator, it can be considered to do so only *in rem*.

By Section 113-602, Georgia Code of 1933, set up by petitioner as a basis for his contention as to the finality of the Georgia judgment in Delaware, it is provided that the Court of Ordinary is given exclusive jurisdiction over the probate of wills and that

[10] Cf. Elsner v. United American Utilities, Inc., 21 Del. Ch. 73, 75, 180 A. 589, 590, affirmed 12 A. 2d 389,—

"On the brief filed by the solicitog for the claimant there are quotations from *sections* 181, 208 and 209 of the *New York Tax Law*. Whether these sections are a part of *article* 9 (*section* 180 *et seq.*) or of *article* 9-A (*section* 208 *et seq.*) of the statute referred to in the notice of claim, I do not know. No point has been made by the solicitors for the receivers to the effect that the New York statute has not been properly pleaded and introduced in evidence. I shall assume then that the quotations in the brief filed in behalf of the State of New York are correct extracts from the New York statute and that by tacit agreement they may be considered as though they were properly in the record."

"such probate is conclusive upon all the parties notified, and all the legatees under the will who are represented in the executor." All the parties entitled to be heard in opposition to the probate, including Mr. Hungerford, were actually before the Court of Ordinary. It may be assumed that the judgment of probate and domicile is a judgment *in rem* and therefore as "an act of the sovereign power," "its effects cannot be disputed" within the jurisdiction.[11] But this does not bar litigation anew by a stranger of facts upon which the decree *in rem* is based.[12] Hence it cannot be said, we think, that because respondent would have no standing in Georgia to contest the probate of a will and, we assume, the preliminary determination of domicile, held necessary in *Hungerford* v. *Spalding*, 183 Ga. 547, 550, 189 S. E. 2, 3, thereafter respondent could not file a claim in Delaware, dependent upon domiciliary representation of testatrix, for assets in the latter state. While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extra-territorial effect upon assets in other states. So far as the assets in Georgia are concerned the Georgia judgment of probate is *in rem*; so far as it affects personalty beyond the state, it is *in personam* and can bind only parties thereto or their privies. This is the result of the ruling in *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 400.[13] Phrased somewhat differently,

[11] See Brigham v. Fayerweather, 140 Mass. 411, 412. The Georgia Supreme Court intimated in one of the other cases cited in the *Hungerford* opinion that if a person was not heard in probate because of a supposed lack of interest, but was in fact interested, he would not be bound by the probate decree. Wetter v. Habersham, 60 Ga. 193, 202; cf. Young v. Holloway, [1895] P. 87; Estate of Seaman, 51 Cal. App. 409, 196 Pac. 928.

[12] Cf. Brigham v. Fayerweather, 140 Mass. 411, 413; Tilt v. Kelsey, 207 U. S. 43, 51-53; Luke v. Hill, 137 Ga. 159, 161-62, 73 S. E. 345, 346.

[13] Illustrative state cases.
A will is admitted to original domiciliary probate in state *A*. Thereafter an ancillary proceeding is commenced in state *B* based upon the domiciliary determination of *A*. At that point a beneficiary, a stranger to the proceeding in *A*, appears and asserts that the decedent was domiciled in *B*. The determination of domicile by state *A* will not be recognized by state *B*, but state *B* will take evidence and redetermine the issue of domicile. Estate of Clark, 148 Cal. 108, 82 P. 760; Holyoke v. Estate of Holyoke, 110 Me. 469, 87 A. 30 (semble); In re Mauldin's Estate, 69 Mont. 132, 220 P. 1102 (semble); Strathmann v. Kinkelaar, 105 Okla. 290, 233 P. 215 (semble); Richards v. Huff, 146 Okla. 108, 293 P. 1028; cf. Estate of Reynolds, 217 Cal. 557, 20 P. 2d 323; In re Coppock's Estate, 72 Mont. 431, 234 P. 258; Matter of Gifford, 279 N. Y. 470, 18 N. E. 2d 663; McEwen v. McEwen, 59 N. Dak. 662, 197 N. W. 862. *Contra*, Corrigan v. Jones, 14 Colo. 311, 23 P. 913; Kurtz v. Stenger, 109 Md. 554, 182 A. 456.
If the objector was privy to the proceeding in state *A*, state *B* will not redetermine the issue of domicile. Willetts' Appeal, 50 Conn. 330; Torrey v.

if the effect of a probate decree in Georgia *in personam* was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process.

It seems quite obvious that the administrator c. t. a. appears in Delaware as an agency of the State of New York, and not as the alter ego of the beneficiaries of the Hungerford estate. In its answer to the petitioners' statement of claim it established its status by alleging that not merely the beneficiaries but creditors residing in New York and the State of New York were interested in the estate, that its appointment as temporary administrator had been sought by the New York Tax Commissioner "to protect the claim of the State of New York to inheritance and succession taxes," that the State of New York was asserting such claims in substantial amount on the theory that the domicile was New York, and that under New York law, as evidenced by statutes likewise pleaded, an administrator was "vested by law with the right to possession and control over and to exercise all manner of dominion over all of the goods and chattels and personal property of every kind and description of the estate of a decedent."

A state is interested primarily not in the payment of particular creditors, nor in the succession of heirs or beneficiaries, as such, but in the administration of the property of its citizens, wherever located, and that of strangers within its boundaries. In a society where inheritance is an important social concept, the managing of decedents' property is a sovereign right which may not be readily frustrated.

Georgia and New York might each assert its right to administer the estates of its domiciliaries to protect its sovereign interests and Delaware was free to decide for itself which claimant is entitled to receive the portion of Mrs. Hungerford's personalty within Delaware's borders.

Affirmed.

Bruner, 60 Fla. 365, 53 So. 337; Loewenthal v. Mandell, 125 Fla. 685, 170 So. 169; Succession of Gaines, 45 La. Ann. 1237, 14 So. 234.

Where the proceeding in state *B* is by a stranger to the proceedings for original domiciliary probate in state *A* upon the theory that the domicile is actually *B*, state *B* will determine domicile for itself. Scripps v. Wayne Probate Judge, 131 Mich. 265, 90 N. W. 1061; In re Crane's Estate, 205 Mich. 673, 172 N. W. 584; Pusey's Estate, 321 Pa. 248, 184 A. 844; see Matter of Horton, 217 N. Y. 363, 371, 111 N. E. 1066, 1068.

Where the person seeking to establish domicile in state *B*, and to have original domiciliary probate there, was a party to the proceeding in state of state *B* will not redetermine domicile. Hopper v. Nicholas, 106 Ohio 292, 140 N. E. 186; cf. Thomas, Jr. v. Morriscit, 76 Ga. 384; In re Fischer, 118 N. J. Eq. 599, 180 A. 633.

Mr. Chief Justice STONE.

I concur upon the single ground that the New York administrator was not bound by the Georgia judgment. He was not a party to the Georgia proceedings, nor was he represented by any of those who were parties. As administrator appointed under the New York statutes he was charged with the duty of administering the estate of the decedent and paying inheritance taxes upon it. His interest so far as he owes duties to the state is therefore adverse to that of the husband and the next of kin, who alone were parties to the Georgia proceeding. To have bound him by representation of those so adverse in interest would have been a denial of due process. *Hansberry* v. *Lee*, 311 U. S. 32. A judgment so obtained is not entitled to full faith and credit with respect to those not parties. *Pink* v. *A. A. A. Highway Express*, 314 U. S. —; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394; *Blodgett* v. *Silberman*, 277 U. S. 1, 18. Any other conclusion would foreclose New York from litigating its right to collect taxes lawfully due, by the simple expedient of a probate by the next of kin of the will of the decedent as the domiciled resident of another state, without notice to any representative of New York or opportunity to be heard.

It is unnecessary to consider the other questions discussed by the opinion.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON concur in this opinion.